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AUTHOR	Jones, Myron
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ABSTRACT

Discussing Indian education in public schools, the paper explains that the new Johnson O'Malley (JOM) regulations will be one of the first major tests of the new Bureau of Indian Affairs (BIA) administration's resolve to put the interests of the American Indian people first. The first section presents discussions on: Tuition Payments and JOM; JOM and Public Law 874; Title I and the Indian Education Act. Section 2 covers 2 issues that are the most highly supported and least controversial in the Indian community: treaty rights and Federal trust responsibility, emphasizing who is responsible for federally connected Indians in public schools. The appendices, which comprise the majority of the report, cover: (1) Arizona JOM Program FY 70-71; (2) a discussion paper on JOM in relation to PL 92-318; (3) JOM funding outside of schools; (4) Indian Education Act, 1973-74 School Year, Gallup-McKinley County Public Schools (New Mexico); (5) JOM comparison of state funding; (6) expected distribution of JOM funds; (7) Title IV, Part A -- Education Committees; (8) an overall summary of the Arizona, Utah, and Oregon JOM Programs; (9) proposed JOM regulations; and (10) a brief conclusion signed by various Indian tribes and organizations. (KM)

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INDIAN EDUCATION IN PUBLIC SCHOOLS

CONFUSED RESPONSIBILITIES -- PREDICTABLE RESULTS

By

Myron Jones, Director

INDIAN EDUCATION TRAINING, INC.
227 Truman Street N. E.
Albuquerque, New Mexico 87108

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INDIAN EDUCATION

I. TUITION PAYMENTS AND JOHNSON O'MALLEY

The initial transfer of Indian students from Bureau schools to public schools in the 1920's came not primarily as a result of Bureau policy, but as a simple question of expediency. Increasing number of Indian students, particularly in California found that, whereas Bureau schools were inaccessible to them, public schools were relatively close by. This was handled through a tuition system where the Bureau would compensate public schools directly on a per pupil basis.

By 1934, there were enough Indian students in public schools to justify new legislation and adaptation of a Bureau policy which would enable an increasing transfer of Indian students from Bureau schools to public schools. In most cases, the students and tribes affected were not receiving adequate Bureau services in any case, and Johnson O'Malley simply represented a formalization of a growing procedure. It did, however, specifically enable the Bureau of Indian Affairs to deal with States instead of negotiating with individual school districts. (It also extended this existing practice in education to apply to health and welfare services.)

A Senate committee report on the Act contains the following language:

> *"This Bill is intended particularly to make it possible that the Department of Interior should arrange for the handling of certain Indian problems with those States in which the Indian tribal life is largely broken up and in which the Indians are to a considerable extent mixed with the general population . . . It becomes advisable to fit them into the general public school scheme rather than to provide separate schools for them. The Indian service has already established the precedent of arranging with many local communities to take Indian children into the public schools, but it has lacked authority to transfer such functions on a broader basis to the States."*

It could be argued that since the Indian Citizenship Act of 1924 automatically made all Indians citizens of the States in which they resided and brought with it a clear State responsibility under existing education laws, this Bill could be used as a device to achieve a wholesale change from Bureau schools to public schools. The testimony of Secretary of the Interior, Harold Ickes, at the time the Bill was being considered shows that Interior wished to approach this question in a very tentative manner:

"There are many sections of the United States where people of Indian blood are so definitely a part of the general population that it is neither necessary nor wise for the Federal government to deal with them on any segregated plan. Moreover, in much of the rural area where Indians are living, educational, health, and other facilities are so limited that it is highly desirable for the Federal government and the State to combine resources wherever possible. In the field of education, this method has resulted in arrangements whereby large numbers of Indian children are attending schools successfully with whites. In agricultural and home extension work, particularly in Montana and South Dakota, the State and Federal forces have been able to combine on some reservations under conditions that would represent financial savings and more effective work if extended to other reservations in these and other States."

"It is not intended, of course, to turn Indians over to the States in large numbers and it is not contemplated that this cooperation will develop to any extent where solid groups of Indians reside, such as in the Southwest, unless Indians themselves seek this type of cooperation. The Indian Bureau finds it extremely difficult to render service to some Indians living in widely-scattered communities, and cooperative endeavor with State authorities would help both Indians and whites living in these more isolated areas."

Whatever philosophical or sociological motives the Bureau of Indian Affairs and the Federal government might have had at the time, a public school motive had already been established -- tuition payment -- and this payment in lieu of taxes became a part of the Bureau's policy. In 1935, Johnson O'Malley contracts were first negotiated in the States of California and Washington. Of these contracts, the B.I.A. said, *"The amount to be paid under the terms of the contract in each case was the same as total tuition payments to the public school districts of the State during 1934."*

During appropriations hearings in 1936, Dr. Carson Ryan, Director of Education for the Bureau of Indian Affairs, said: *"The chief argument for paying Federal tuition for the Indian children is that the existence of the untaxed Indian land deprives the school district of part of its taxable resources . . . If there is no untaxable Indian land, it is a little difficult to justify payment of a Federal subsidy."*

In the FY 1937 hearings, Assistant Director of Education, Paul _____ spoke more specifically of the Bureau's method of distributing tuition funds. He talked about State equalization laws, taking the burden off local property taxes for education, and how these laws affected the B.I.A.'s policy:

"When arrangements can be made with the public school district to provide the, the special services (food, clothing, school supplies, etc.) are included in the tuition agreements and furnished by the school district. We are from time to time requiring the States and districts where this can be arranged to assume the greater part of the strictly educational costs, thus providing that an increased proportion of tuition paid shall be expended for special services."

"There are some States where there is no equalization law and the districts are still largely dependent on local taxation. Here, the Indian Service must continue to assist with the actual cost of maintaining the schools as well as providing funds for the special services required for Indian children."

In the same year, fiscal 1937, the Bureau offered this explanation of California and Washington contracts:

"These contracts provide for the education of the Indian children; and where required and the extent to which funds are available under the contracts, for their transportation to and from school, for noon day lunches, textbooks, school supplies, school medical and dental services; also, so far as practicable for special courses desirable for Indian children."

II. JOHNSON O'MALLEY AND PUBLIC LAW 874

In 1958, Public Law 874 (Federal Impact Aid) was amended to include Indian children living on Federal land. This obviously effected the financial situation of school districts and was reflected in Bureau of Indian Affairs Code of Federal Regulations:

I. EXISTING REGULATIONS

33.4 -- Contracts with Public Schools

a) Contracts may be entered into under the provisions of the Act of April 16, 1934 (48 Stat.596) as amended by the Act of June 4, 1936 (49 Stat.1458, 25 U.S.C. 452-456) with the authorities of any State for the education of Indian children of one-fourth or more degree Indian blood, unless excepted by law, and to expend under such contract monies appropriated by Congress for such purposes and to permit the use of existing federal Indian school

facilities and equipment by the local school authorities under such terms as may be agreed upon.

b) *The program will be administered to accommodate unmet financial needs of school districts related to the presence of large blocks of non-taxable Indian-owned property in the district and relatively large numbers of Indian children which create situations which local funds are inadequate to meet. This Federal assistance program shall be based on the need of the district for supplemental funds to maintain an adequate school after evidence of reasonable tax effort and receipt of all other aids to the district without reflection on the status of Indian children.*

c) *When school district educating Indian children are eligible for Federal aid under Public Law 874, 81st Congress (64 Stat.1100), as amended, supplemental aid under the Act of April 16, 1934, supra, will be limited to meeting educational problems under extra-ordinary or exceptional circumstances. (22 F.R.10533, December 24, 1957, as amended at 23 F.R.7106, September 13, 1958)*

It's clear from these regulations that at this point the Bureau is operating with some contradictions. One the one hand, paragraph "b" implies that Johnson O'Malley funds are to be used only as financial reimbursement for school districts' needs directly related to Federal non-taxable land. On the other hand, section "c" acknowledges that these financial needs will generally be taken care of by Public Law 874, and that Johnson O'Malley *"will, therefore, be limited to meeting educational problems under extra-ordinary or exceptional circumstances."*

The problem with this, of course, is that there is no definition for educational problems or extraordinary or exceptional circumstances. In a 1961 Senate hearing, B.I.A. Chief of Education, Hildegard Thompson, attempted to define the type of district that would still be eligible for Johnson O'Malley funds: *"Where there is no tax resource or practically no tax resource in the district, and the only financial resource the district has is a State aid program, plus what they get from 874, and the two together would not put them at all where they could operate an adequate program."* Again, the difficulty here is that the Bureau then had no way to define what they meant by "an adequate program." Twelve years later, they still have no way to define "an adequate program."

The actual policy in relation to Johnson O'Malley use depends not on the Bureau but on individual States. For example: The State of New Mexico Johnson O'Malley Plan defines an adequate school as one that meets State Minimum Standards, and specifically provides that all Johnson O'Malley funds must be used for special, supplementary programs above and beyond the Minimum Standards. In a Federal district court decision last winter involving the Gallup New Mexico school district, Judge Bratton carried this principle one step further and ruled that Johnson O'Malley funds should be used to provide special Indian programs only after school districts had demonstrated comparability in relation to their use of other funds. In New Mexico, the amount of taxable property and the tax rate, however low, is not considered a factor in Johnson O'Malley distribution. In fact, one district with the lowest tax levy in the State has consistently received Johnson O'Malley funds while at the same time, having an unbudgeted surplus that far exceeds their Johnson O'Malley program requested.

On the other hand, the neighboring State of Arizona has a Johnson O'Malley State Plan that rests almost exclusively on financial questions and ignores program questions. They take a tax levy mean average of all Johnson O'Malley districts. All districts above the average receive funding; all districts below the average receive no funding. There are no requirements on how the money can or should be used, and, according to the State of Arizona's own report, in fiscal 1972, of $3.8 million received, only $10,000 was used for special programs. In effect, you could say that in some States, the existence of Public Law 874 and its funding factor has been acknowledged and Johnson O'Malley is meant to be used as an Indian Title I program; in other States, they are still pretending that 874 doesn't exist.

There are, of course, other factors that should be taken into account but are not. In many of the Western school districts, improvements (gas and oil leases, industrial development) on Indian land have progressed to the point where taxes from Indian land contribute far more to the school district than non-Indian taxes. For example, in the Bloomfield, New Mexico school district, which is less than 25% Indian, 60% of all local taxes are paid by the El Paso Natural Gas Company off Navajo land, and on Navajo land alone, in both Arizona and New Mexico, El Paso Natural Gas pays slightly more than $2 million a year in school taxes. This sometimes large factor of taxable improvements probably could not have been anticipated either in the 30's when Johnson O'Malley was passed or in the 50's when the regulations were written, but that is not the problem. The difficulty now is that neither the Bureau of Indian Affairs as a part of a national policy, nor individual States, takes into account this factor, and no distinction is made in the distribution of funds between districts that have a considerable tax base and districts that have virtually none.

III. JOHNSON O'MALLEY, PUBLIC LAW 874, AND TITLE I

If Public Law 874 removed the argument for use of Johnson O'Malley as in lieu of tax payments, Title I threatened to eliminate the need for Johnson O'Malley on special programs since Title I was meant to serve all eligible pupils, including Indian pupils. This meant in theory, that if Indian

students represented the most educationally disadvantaged in a school district, they would become the target group for Title I funding and Johnson O'Malley would function as a duplication. One reading of Bureau regulations after the passage of Public Law 874 would indicate that Johnson O'Malley had anticipated Title I and had become an Indian Title I program. Ironically, however, the fact that it had not become one formed a pressure base to retain Johnson O'Malley from those very schools which had abused it most. Those school districts were not about to let lovable, old, never-say-"no" Johnson O'Malley drop in favor of a Title I program with strict guidelines that were at least theoretically enforceable. Within the national Indian community there was also great pressure to keep Johnson O'Malley, not only because it was familiar but because it was viewed at least in its intention, as a specifically Indian program, and Title I, of course, was not.

The Title I Act and accompanying regulations are an implicit and sometimes explicit declaration that the Federal government does not trust local school districts to program compensatory Federal program funds toward the greatest needs of their least successful pupils. The history of Johnson O'Malley demonstrates the validity of OE's assumption. However, it is precisely this potential for enforcement that the local school districts use with Indian people: "Who knows local needs best? Us, or the Feds?" Unless the local community is sophisticated enough and bold enough to say, "Who's the us?," this argument frequently works.

In the past, the argument has worked with Office of Education programs in a way that is not possible with Bureau of Indian Affairs programs. This is partially because the Bureau is not only more "local" than the Office of Education, they are more local than the public school administrators. Agency staff members and even Area staff are invited to and participate in far more tribal council and inter-tribal meetings than do school officials of any rank. Another factor is that the Bureau of Indian Affairs and the Indian community have now passed two golden anniversaries in a tenuous and miserable marriage, but a marriage in which the threat of Federal divorce can override all other questions. Hostility toward the Federal government can be directed more safely away from the Bureau of Indian Affairs, and both the Bureau and the public schools have sometimes exploited this situation. (NOTE: I refer throughout to Title I, rather than ESEA because the other Title have been a relatively small factor in Indian communities.)

The Office of Education keeps two sets of figures on Title I: (1) total number of eligible students; (2) actual program participants -- actual Indian participation depends on the school models and involves previous use of Johnson O'Malley.

Category 1: Major Impact -- districts that are over 75% Indian and receive substantial ($400 per pupil or more) non-categorical JOM funding.

Arizona, Alaska, the Dakotas would contain most of these districts. In these districts, JOM funds are used for what the school administration (and an occasional active school board member) considers "meat and potato" needs, and Title I supplies the dessert (usually pre-packaged). If there are JOM funds left over, they may be used for non-classroom supportive services (school supplies, P.E. equip-

ment, extra-curricular transportation, etc.). Title I will be used exclusively for supplementary classroom needs, usually more of what hasn't worked in the basic school program.

Category 2: Major Impact -- categorical districts

This would include districts in New Mexico, Montana, and Washington where the State Plans require that JOM be used only for supplemental and categorical programs. Generally speaking, these districts use JOM and Title I in similar types of programs, primarily remedial. Most staff people can be moved back and forth from one to another without knowing the difference.

Category 3: Districts with sizable numbers (more than 200) of Indian students but comprising less than 60% of the school district and with a competing Title I group

All Johnson O'Malley States have some of these school districts. If the State Plans do not limit the use of JOM to special programs, the Indian students will participate in the Title I programs although these programs pretend in no way to be specifically based on Indian educational needs. If they are designed in relation to any specific needs, they will be primarily geared toward the other Title I group, e.g., Spanish/English as a second language program. If, however, the States require JOM to be used for supplementary programs, JOM becomes the Title I, and the regular Title I programs become overwhelmingly non-Indian. Until last year, a Title I director in one of these kinds of school districts believed that Indian students were meant to be excluded from Title I funds to the "non-Indian" schools.

Category 4: Districts with fewer than 200 Indian students comprising less than 20% of the school population

These districts have usually received very low JOM funding. There were, for example, 12 such districts in the State of Arizona in fiscal 1972. They split $84,324 amongst themselves. This averaged out to $30.04 per pupil, compared with a State average of $337. An additional 14 "minor" impact districts received no JOM funding at all in fiscal 1972. (Appendix A)

Indian students may or may not participate in Title I programs but they certainly do not form a Title I pressure group. In the rare instances in which these districts have been able to secure substantial JOM program funds, the Indian students do not participate in the Title I programs; not necessarily because they would be excluded from participation, but because all community energy is taken up with planning Johnson O'Malley funds.

In many of these smaller districts, Title I funds might be three times as big as JOM, but they tend to be ignored because: (1) They are newer; (2) Title I regulations and guidelines are far more complicated; (3) They are not exclusively Indian.

IV. JOHNSON O'MALLEY, PUBLIC LAW 874, TITLE I & INDIAN EDUCATION ACT

Two underlying assumptions behind the Indian Education Act are: (1) The Bureau of Indian Affairs does not know how to deal with public schools and the Office of Education does; (2) In terms of public school education, the Bureau has dealt and will continue to deal only with its own constituency, Federal Reservation Indians.

Certainly a part of the first assumption is true. The Bureau has no policy or system which will enable it to deal with State education systems or public school systems. Any reforms in Johnson O'Malley have begun locally and have been accepted by the Bureau after the dust has settled. There are individuals within the Bureau who are both knowledgable and concerned about Indian education in public schools; there is simply no structural way for them to act on it.

When the Indian Education Act was passed in June, 1972, the Bureau undertook an analysis of it which was sometimes accurate, frequently misinformed, and occasionally paranoid. It stated that Title IV would eliminate Title I in B.I.A. schools and thus cost 700 Indian jobs. It suggested ominously that the Bill could have "grave implications for Johnson O'Malley" because of the implied duplication in two Acts. (Appendix B)

In the summer of 1972, before there was any assurance of supplementary funding for fiscal 1973, several OE regional offices held orientation meetings on the Indian Education Act. Since the regional offices had not been involved in either planning the legislation or planning implementation of the Act, they assumed they would have a role, not through specific delegation that grew out of Title IV, but of a general administration policy of regionalizing all programs. What the OE people didn't know was that regionalization is a dirty word in the Indian community both because going directly to Washington is a well entrenched habit, but because regionalization is (viewed with some justification) as a move toward greater State interference.

To be kind about it, I would say that these orientation meetings were unsuccessful. The prospects for implementation were totally unknown; the potential or imagined threat to JOM was actively fed by the B.I.A., and OE staff could not offer concrete assurances in the matter, since what was/is still really required is policy planning between the Bureau and the Office of Education. (NOTE: There have been several meetings between the two agencies, but no results, and there can be none until the Bureau develops a program data retreival system with fiscal accountability.)

At the moment, Title IV, Part A and the Bureau, through Johnson O'Malley, could fund identical programs and neither group would know the difference. In fact, if a school is bold enough, it can get duplicate funding for supportive services and no one will know the difference, e.g., in the Gallup New Mexico School District, JOM pays the full cost of lunches for students whose families are either above USDA guidelines or failed to fill out the USDA lunch forms. The school district has applied for and received approval to add 5¢ per lunch for every elementary school child and 10¢ for every high school student. They will receive the same funding for every Indian student in the USDA school lunch program. Their budget for this is $76,981 -- all duplication. This same district receives another $23,019

to "raise salaries in order to hold present employees and assure that all minimum wage requirements are met." This will enable them to "increase salaries of all employees at the rate of 5% of present salaries (includes 103 Indian cooks or 63%)." (Appendix C) (NOTE: This is not a random district. They have the largest Indian student population in the country, approximately 6,000 and subsequently, the largest Part A funding in the country.) The questions is not, "How is such a heist possible?" but rather "Who could possibly be in a position to notice it or stop it?" Generally, the problem is that the Bureau has no system of program accountability. In this particular case, the State of New Mexico -- There is program accountability and monthly reporting on a budget line item basis. Districts are reimbursed only in relation to their actual expenditures. This has no effect on Title IV/JOM duplication since there is no provision for shared information.

In terms of legal/legislative history, it is understandable that Part A operating as an amendment to Public Law 874 would operate in a similar way, directly from Washington to the districts. However, the earlier sections were specifically designed to guarantee an absence of attached strings. When this same principle is established in a programmatic amendment, you inevitably wind up with Gallup lunch programs.

Although there is great variation in both accountability and data retreival, all but two States (Arizona and Alaska) now at least claim to use 30% of their Johnson O'Malley funds for special programs (more than half the States claim to use all). (NOTE: Alaska and Arizona together use $8,649,000 of a total allocation of $25,352,000. In the field of JOM, crying poorhouse not only requires no proof, it produces far more money than requests for supplementary aid.) The attached list (Appendix D) shows Johnson O'Malley comparison of State per pupil funding by control category.

There is no question that the move is away from State control and toward tribal corporation or inter-tribal corporation control. Four years ago, the Nebraska Inter-Tribal Corporation became the first group to contract for Johnson O'Malley. They were followed the next year by North Dakota and South Dakota. The Pueblos and Apaches together picked up their portion of the JOM contract from the State of New Mexico in fiscal 1973. This year, Minnesota, Michigan and Wisconsin picked up contracts. The Alaska contract is scheduled to go to the Alaskan Federation of Natives next year.

A secondary but important move in Johnson O'Malley is that of tribal splits within an inter-tribal contract. Nebraska and New Mexico have both had individual tribes pull out of their contract and Minnesota began with a split contract. This has considerable implications for monitoring because the splits result in an orientation that focuses only on the school district and by default denies access to the kinds of information gathered on a State-wide level, i.e., comparative performances on standardized tests, school lunch programs, Title I monitoring, fiscal accounting procedures.

The flight from the States is based on negative experiences. When a State has had to choose between constituencies (school administrators/boards or Indian people) they've gone with the schools. They remain, however, an essential source of financial and program information and should not be ignored. Some of the most regressive school districts see this question

clearly and opt for tribal rather than State control. They are not sudden converts to Indian self-determination. They are believers in enlightened self-defense.

Johnson O'Malley program schools can be lumped into:

1. one category for the initial purpose of monitoring; their programs would all have to be checked through the individual contractors

2. basic support schools, i.e., those who receive JOM funds but run no separate, identifiable programs

3. school districts that have had eligible pupils (by B.I.A. regulations standards) but do not receive funds under the terms of their respective State Plans

4. school districts that have not been eligible for JOM funds: districts serving only urban Indians, State-recognized tribes, terminated tribes, etc.

All four categories should be monitored not only on their Part A programs, but on the relationship, if any, between their new programs and all previous programs, including their basic, all-the-time-for-everybody programs.

A New Mexico school superintendent in a rare moment of simple honesty deliberately did not apply for Title IV funds because he said they hadn't yet really figured out what to do with Johnson O'Malley and Title I.

There is a rule of money that once legislation and regulations have been written describing a problem and offering cold cash to meet that problem, some problems, any problems with accompanying solutions will then spring full-grown from the heads and typewriters of Federal projects officers in school districts all over the country.

A scanning of Part A proposals indicates that this rule has not been violated. Since districts have been asked to submit programs under an Indian Education Act to meet "special Indian education needs," and since they usually have not been able to determine which needs, if any, are uniquely Indian, they have solved the problem through verbal equations. Indian education means "Indian" remedial reading, i.e., regular remedial reading courses when attended by Indians. Indian education means "Indian" remedial math, etc., i.e., math courses attended by Indians.

Since most of the standard guidelines for evaluating "Indian" education needs are heavily laced with anthropological and political assumptions, it is not surprising that most school districts finally rely on a "chicken soup" -- it couldn't hurt -- approach to programming. A vital technical assistance role that can grow out of monitoring should be not condemnation for their reliance on soup but some alternative suggestions based on models of success in Indian education, which would have to include alternative definitions of success in Indian education.

given the steady proliferation and increasing confusion surrounding Federal programs and fundings, it would seem that the monitoring goals should eschew magnificence and beauty and concentrate on compliance and improvement. As Shakespeare so eloquently put it, "Any improvement would be an improvement." On second thought, maybe it wasn't Shakespeare.

INDIAN EDUCATION -- SECTION 2

All the confusion described in the first section has grown out of two issues that are the most highly supported and least controversial in the Indian community: Treaty rights and Federal trust responsibility.

If one reads the scores of treaties containing education provisions, much of the language seems almost ludicrous -- thinly disguised attempts to add insult to injury, e.g., Article VI of the Navajo Ft. Sumner Treaty, June 1, 1868:

> *"In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than ten years."*

Ten years have long since passed but that represented a minimum, not a maximum. The provision of one teacher for every thirty students may have been the first American attempt at precise minimum standards. It's interesting to note that in many Arizona schools (which most Navajos attend), in the year 1974, they do not have a teacher-pupil ratio of 1-30. In spite of treaty language, the treaties themselves have clear value for Indian people. They represent both a promise and a guarantee of Federal support and back-up.

Bureau of Indian Affairs schools have been "phasing out" since the 1930's. One measurable result of their success has been that there are more Indians in BIA schools now than there were when the phase-out began. (Nevertheless, the actual percentage of Indians in Bureau schools has decreased sharply, and that percentage will continue to decrease sharply.) The current estimate is that 67% of Federally-connected Indians are in public schools. Within ten years, that number is expected to reach 75%, and that brings us to the question of this paper: When Federally-connected Indian pupils are in public schools, whose responsibility are they? Everyone -- Indians, public schools, State Departments of Education, the Bureau of Indian Affairs.

The Office of Education agrees that there is shared responsibility. There is no consensus either among or within any of the named groups as to exactly who is responsible for what. This failure to reach an agreement on responsibility is one of the clear failures of all educational processes. As an old time school man once said, "Parents and teachers usually can agree on only one thing -- developing a child is the other guy's business. As teachers, we hope the kid we send home in the afternoon will come back the next morning transformed and ready to do what we think he should do. And the parents hope (with equal conviction) that the kid they send to school in the morning will return in the afternoon -- transformed and ready to do whatever the parents want them to do."

In Indian education, this is further compounded because school systems have been trained, through confusion in Federal and State policies to wonder whether or not they should be doing anything with Indian students unless the Feds are willing to meet their responsibility.

The State of Arizona represents this problem in its most extreme form. This quote is from a press conference held by their Deputy Superintendent of Schools and it appeared in the Arizona Republic of April 19, 1972 (see Appendix F). "BIA officials allocated $3.5 million to the State this year as its share of cost, but Harrell (Deputy Superintendent of Schools) said it wasn't enough and the $1.1 million is needed to continue operations without a deficit. If Congress refuses the appropriations, he said the districts could be forced to shut down, although he said this wouldn't occur for two years."

He is referring to 15 districts involving 15,000 pupils. The statement about closing all these districts because of a supposed deficit of $1.1 million may be simply a forceful plot to force additional Federal funding, but it is inconceivable that any State Department would make that threat against non-Indian schools. The same article says in an earlier paragraph:

> *"The State needs this agreement because parents of Indian children, whether the children attend reservation schools or go to public schools, pay no taxes. Thus, the districts involved must levy a tax equal to the statewide average school district property tax on the few landowners who are eligible to pay -- normally large utilities that have operating plants on or near reservations. To make up the difference between these taxes and what the districts require to operate, the BIA pays its money."*

It is significant that the "other" Federal money, Public Law 874, which accompanies every reservation child to the local school coffers isn't mentioned although the per pupil amount exceeds the tax rate in all comparable non-Indian districts. The statement about Indians paying no taxes is, of course, a myth that is as erroneous and destructive as the notion that all Indians have oil money flowing in regularly. There may be people who through innocent ignorance believe both stories. The State Department of Education in Arizona knows better, but their rhetoric is perhaps appropriate for the general readership of the Arizona Republic. It not only shifts the State's financial obligations to the Feds, it reinforces prejudice against Indians as helpless wards.

When it becomes convenient, Public Law 874 funds are not only mentioned, they become the crucial factor. Arizona Indian students who live in BIA dormitories but attend public schools within the State are totally supported out of BIA funds. The justification here is that Public Law 874 payments are not made for those students, and on this excuse no State support at all is given. This is in direct violation of the State Constitution which promises free public education for all children of the State.

This is one extreme in relation to Federal responsibility. The other extreme can be found in States that require Johnson O'Malley to be categorical and supplementary and require parents committees. In these States, some districts have rejected all Johnson O'Malley funding because the schools say they do not need the money and they do not wish to become involved with parents committees. These qualms disappear in relation to non-categorical Federal funding (Public Law 874).

The national move is clearly away from Arizona type basic support programs and toward supplementary programs. Every year for the past five years, at least one more State Plan has been revised to reflect this change. In all cases, the reform has been initiated through Indian pressure which has been funneled through the BIA, Congress, or State Education Departments themselves.

Supplementary Federal programs have created their own problems, however, and again the root cause is a confusion as to responsibility. More and more schools are taking the position that their job is to provide a basic, Robert Hall, off-the-rack program (the kind that is always said to be appropriate for white middle class kids, but is in my view appropriate to no one at all, including the people who have been teaching it for thirty years). This attitude says, "We'll give you what we got. If it doesn't fit, if you want something appropriate to you, you'll have to do it with Federal funds."

Dr. Tom Levin of the Mississippi Headstart Program once said, "There will never be an American revolution. Once people start to actually march on the Capitol, they'll be strafed with twenty dollar bills and turned back." With inflation, fifty dollar bills would not be substituted, but the principle still applies. (The AIM occupation of the BIA building ended with the distribution of $62,000 in cold cash hand-delivered in suitcases.) This diversion through largess has clearly been used in Indian education both to institute reforms and changes and to block them.

If Indian parents and students protest their dissatisfaction with their American History courses because Indians are either not mentioned or are mentioned unfavorably, the school will react, not by changing their real, i.e., five-times-a-week course, but by offering a once-a-week JOM course in Indian history. In other words, the Federal funds are used not to correct the original distortions but to divert the corrective process and to maintain the distortions.

In another kind of distortion, Federal funds are used to obscure failures rather than correct them. Example: A school district in New Mexico shows that Indian students in the eighth grade have average reading scores at a 5.2 level. They could conclude from this that there is something wrong with their reading programs, or their entire program in grades K-8. They draw another easier conclusion. Indians are not college material. As a result, 95% of their JOM funding is used to provide special high school vocational programs.

There is one other fairly common instance of Federal compensatory funds leading to unfortunate results, and in this case, ironically, there are the greatest problems where the intentions are probably the best. When school districts (Albuquerque, New Mexico is a good example) have relatively few Indian students but are still large enough to pursue Federal funding aggressively, they have created a Federal school system within a school system.

The 300 reservation students attending Albuquerque public schools have more money in compensatory programs behind them than they do in basic operational programs. There are students who have more special classes than regular classes at least three days a week. Since most of the classes are remedial programs on core subjects, the school has unintentionally built an abyss. Regular teachers don't have to teach their Indian students successfully because the other special classes are taking care of all the problems. On the other hand, the teachers in the special classes are "doing as well as they can but are clearly no substitute for adequate basic instruction."

In theory, supplementary/compensatory funds are given school districts so that they may both respond to programs that have not met their goals and to develop new goals and new approaches. In practice, supplementary programs, particularly in areas of basic skills, become set aside versions of what has always gone on. There is no measurement of success or failure, no attempt to seriously measure objective results. As far as I know, only Minnesota has ever attempted an evaluation of Johnson O'Malley programs in terms of their success or failure.

The Bureau of Indian Affairs is, as far as I know, the only Federal agency that requires no evaluation at all as a condition of refunding. Appendix G contains three State reports from the Bureau's current annual report and documents my above statement.

It would be helpful if there were the standard self-serving evaluations in which successful programs were discussed and documented and failures were swept aside. But here, as in other aspects of Indian education, there has

been a paucity of study regarding success. What does work? With whom? How much effect can even the best schools have? How important is family stability?

There is one Johnson O'Malley area that has a constant evaluation from the students and parents affected: extracurricular buses without which most Indian students would be shut out of all but classroom activities, gym shoes, class rings, lunches, health services, clothing. In working with parents committees, our organization has found that educators and parents, with rare exceptions, assess two totally different sets of needs. School people talk about classroom needs -- curriculum, instructional supplies, new materials. Parents talk about supportive services. This is not surprising. Each group is discussing what is visible to them -- their world. The problem is that the kids have to live in both those worlds.

When school people talk about more and more remedial programs, the parents object because they can't see what possible effect those programs will have. Their kids still don't understand math. Conversely, school people are highly critical of parents backing out of pocket expense items. To many administrators that is proof that the parents are not interested in their children, but only in their own financial status. Since no one has documentation on the effects of additional classroom programs, and since few Indian students are running home shouting, "Gee, Mom, we got a neat new remedial math course," the parents operating with simple pragmatism opt to spend the money where they know it will make a difference to them.

For years, it has been suggested to the Bureau of Indian Affairs that they should tighten up their evaluation procedures. They have never done so, but have always claimed that they were "doing their best." After five years of watching their efforts, I'm afraid I've come to believe them. The Bureau is also incapable of using other people's evaluations. They have proven this by their confusion when States or Indian contracting groups have voluntarily gone beyond requested evaluation procedures. Understandably. Once they accept a higher standard of accountability, they will be challenged to apply that standard everywhere. Incompetence has no value in itself. Calcified incompetence becomes a protective shell.

There is a way out of this, and that is to set up a system for local evaluation and accountability. Approximately 50 Indian organizations are now proposing a change in Johnson O'Malley that would allow (but not require) contracting within a school area (Appendix H). The funds would be distributed on a formula entitlement basis, but the entitlement would be directed to Indian students and children, from birth to high school graudation, not to the public schools. Funding would be based on 50% of the State or national average, whichever was higher, for supplementary programs and 100% of per pupil costs (State or national) for alternative programs. Under this system, the parents would direct their entitlements to whomever they considered to have the best delivery system: public schools, Bureau schools, Mission schools, community-controlled alternate schools.

This sounds like a small voucher system, and it is, with one exception: It does not eliminate the public school system. It does give parents more responsibility than they've had before, and it puts them in a position of demanding and enforcing performance. Up to now, the schools have been given a new year around Thanksgiving feast, and the Indian parents have hung around the table hoping to salvage some leftovers. We think the feast should start with the Indians, and they should decide where and how to distribute the largesse.

MJones:lce
April 4, 1974

	SCHOOL DISTRICT	BIA EST. INDIAN %	EST. 71-72 TOT. ADA	EST. 71-72 IND. ADA	GR. TOT EX. W/O CATEG AID	PER PUPIL EXPENDITURE	EST.71-72 JOM AMT.
K-12	Chinle	90.2	2350	2120	3,191,913	1358	1,205,412
	Ganado	91.2	1264	1153	2,077,524	1644	858,324
	Window Rock	85.5	2160	1847	2,818,416	1305	850,000
	Indian Oasis	97.6	860	839	955,000	1110	123,000
	SUBTOTALS,SUBMEANS	89.8	6634	5959	9,042,853	1363	3,036,736
9-12	Apache Co. H.S.	29.0	722	209	1,125,964	1560	-0-
	Tuba City H.S.	64.1	412	264	589,255	1430	133,909
	Ft. Thomas H.S.	73.6	106	78	198,377	1871	79,000
	Tolleson Union H.S.	1.3	793	10	775,240	978	-0-
	Gila Bend H.S.	5.5	185	10	265,416	1435	-0-
	Mesa H.S.	18.0	5609	1190	6,577,966	995	10,000
	Mohave Co. H.S.	1.8	1800	32	2,318,879	1288	2,000
	Alschesay H.S.	78.4	279	219	530,358	1901	193,782
	Monument Valley H.S.	67.4	325	219	666,061	2049	359,165
	Casa Grande H.S.	9.6	1300	125	1,422,056	1094	300
	Coolidge Union H.S.	5.6	744	42	783,374	1053	-0-
	Markopa H.S.	19.9	130	26	189,118	1455	1,500
	Prescott H.S.	0.4	1526	6	1,544,468	1012	-0-
	N.Yuma Co. Union H S	22.5	622	140	945,470	1520	8,500
	SUBTOTALS,SUBMEANS	16.5	15553	2570	17,932,002	1153	788,156
Elementary through Grade 8	Round Valley	3.1	670	21	498,556	744	-0-
	Puerco	80.5	490	394	560,110	1243	163,040
	Page	38.6	1123	433	990,664	882	3,000
	Tuba City	87.1	1225	1067	1,466,631	1197	222,277
	Rice	94.7	935	885	1,103,530	1180	53,000
	Young	90.6	275	249	270,855	985	3,000
	Ft. Thomas	73.8	315	232	323,622	1027	43,000
	Gila Bend	6.5	550	36	389,131	708	-0-
	Kyrene	2.2	585	13	462.666	791	-0-
	Laveen	3.7	1500	56	881,425	588	-0-
	Mesa	3.3	15602	515	11,609,077	745	20,000
	Union	59.0	144	85	100,220	696	-0-
	Moccasin	47.4	16	8	18,707	1169	1,400
	Peach Springs	93.3	95	89	83,387	878	-0-
	Valentine	28.6	26	7	24,850	956	1,124
	Mohave	11.1	330	37	371,637	1126	5,000
	Kayenta	92.4	863	797	1,113,449	1290	319,347

(continued on next page)

O'MALLEY PROGRAM FY1970-71

Appendix A

PER PUPIL EXPENDITURE	EST.71-72 JOM AMT.	PER JOM PUPIL EXPENDITURE	GRAND TOT EX W/O JOM	PER PUPIL EXPENDITURE	AMT.SPENT ON INDIANS *
1358	1,205,412	569	1,986,501	845	1415
1644	858,324	744	1,219,200	965	1709
1305	850,000	460	1,968,416	911	1371
1110	123,000	147	832,000	967	1114
1363	3,036,736	510	6,006,117	905	1415
1560	-0-	-0-	1,125,964	1560	1560
1430	133,909	507	455,316	1105	1612
1871	79,000	1013	119,377	1126	2139
978	-0-	-0-	775,240	978	978
1435	-0-	-0-	265,416	1435	1435
995	10,000	8	6,567,966	994	1002
1288	2,000	63	2,316,879	1287	1350
1901	193,782	885	336,630	1207	2092
2049	359,165	1640	306,896	944	2584
1094	300	2	1,421,756	1094	1096
1053	-0-	-0-	783,374	1053	1053
1455	1,500	58	187,618	1443	1501
1012	-0-	-0-	1,544,468	1012	1012
1520	8,500	61	937,240	1507	1568
1153	788,156	307	17,144,140	1102	1409
744	-0-	-0-	498,556	744	744
1243	163,040	414	397,070	810	847
882	3,000	7	987,664	879	886
1197	222,277	208	1,244,354	1016	1224
1180	53,000	60	1,050,530	1124	1184
985	3,000	12	267,855	974	986
1027	43,000	185	280,622	891	1076
708	-0-	-0-	389,131	708	708
791	-0-	-0-	462,666	791	791
588	-0-	-0-	881,425	588	588
745	20,000	39	11,609,077	744	783
696	-0-	-0-	100,220	696	696
1169	1,400	175	17,307	1082	1257
878	-0-	-0-	83,387	878	878
956	1,124	161	23,726	913	1074
1126	5,000	135	366,637	1111	1246
1290	319,347	401	793,602	920	1321

SCHOOL DISTRICT	BIA EST. INDIAN %	EST. 71-72 TOT. ADA	EST. 71-72 IND, ADA	GR. TOT EXP W/O CATEG AID	PER PUPIL EXPENDITURE	EST.71-72 JOM AMT.
Keams Canyon	59.8	311	186	521,106	1676	299,359
Whiteriver	86.3	1062	917	1,041,649	981	108,896
Casa Grande	1.8	2454	44	1,881,879	767	-0-
Coolidge	7.7	1766	136	1,206,947	683	-0-
Maricopa	1.8	388	7	348,945	899	-0-
Sacaton	96.6	704	680	848,547	1205	220,000
Stanfield	2.6	448	12	359,442	802	-0-
Prescott	0.4	2644	11	1,970,691	745	-0-
Crane	0.9	1340	12	1,085,143	810	500
Parker	26.8	1054	282	886,247	841	31,000
Somerton	3.6	880	32	517,530	588	-0-
SUBTOTALS,SUBMEANS	19.2	37795	7243	30,956,643	819	1,494,443
GRAMD TOTALS, GRAND MEANS	26.3	59982	15772	57,931,498	966	5,319,335

through Grade 6

* ASSUMES JOM IS SPENT ONLY ON INDIAN PUPILS, I.E. IT IS CORRECTLY SPENT

T EXP TEG AID	PER PUPIL EXPENDITURE	EST.71-72 JOM AMT.	PER JOM PUPIL EXPENDITURE	GRAND TOT EXP W/O JOM	PER PUPIL EXPENDITURE	AMT. SPENT ON INDIANS *
106	1676	299,359	1609	221,747	713	2322
649	981	108,896	119	932,753	878	997
879	767	-0-	-0-	1,881,879	767	767
947	683	-0-	-0-	1,206,947	683	683
945	899	-0-	-0-	348,945	899	899
547	1205	220,000	324	628,547	893	1217
442	802	-0-	-0-	359,442	802	802
691	745	-0-	-0-	1,970,691	745	745
143	810	500	42	1,084,643	809	851
247	841	31,000	110	855,247	811	921
530	588	-0-	-0-	517,530	588	588
643	819	1,494,443	206	29,462,200	780	986
498	966	5,319,335	337	52,612,457	877	1214

LY SPENT

Appendix B,

Discussion Paper on Johnson O'Malley in Relation to P.L. 92-318

I. Since the passage of P.L. 92-318, particularly Title IV, Part A, there has been considerable discussion of the problems created by the seeming similarities of purpose of the two Acts. This discussion has taken several forms: Interior Department has stated that the similarities represent a factor that must be taken into account in revising Johnson O'Malley regulations (see Appendix A). It has been suggested at regional and district meetings of Indian parents that Title IV threatens JOM funding. It has been suggested that Title IV threatens the entire existence of JOM. At the other extreme, JOM funding has been used as a justification for not funding Title IV, particularly Part A.

II. If present JOM regulations, existing State Plans for JOM and JOM operating systems are set aside, and one examines only the two pieces of legislation, they are noticeably different. Part IV specifically provides for supplemental programs in public schools. By law, they must be administered by the LEAS; grants are given directly to the LEAS, and they must be used for supplementary programs. The Johnson O'Malley Act is far broader in scope (see Appendix B). In fact, there is nothing in the Johnson O'Malley Act that says it must go either to States or to public school districts. In practice, JOM has been used only for public school districts and it has been used for supplemental programs; it's been used for basic school support; it's been used to meet State minimum standards; it's been used to meet the parental costs and instructional supplies.

The uses of Johnson O'Malley have not grown out of the law. They have been determined by pressures from States and public school districts, counter pressures from Inter-tribal groups and organizations, habit and custom,

e.g., "presence of large blocs of non-taxable land" has been an anachronistic part of the JOM regulations since 1958 when P.L. 874 was extended to include Indian lands, yet it remains on the books. In New Mexico, JOM can be used only for supplementary programs, above State minimum standards, and parents committees are required. In Arizona neither of these standards applies and 70% of the JOM funds are used for basic support.

III. QUESTION: In order to avoid the problems of overlapping funding, why not use the broad language of the JOM Act and concentrate Johnson O'Malley funding outside of the school districts and within the Indian communities for the benefit of Indian students attending public schools. This could apply only and whenever a school district begins to receive Title IV, Part A funding. This would provide for a genuinely supplementary use of both sets of funding.

The present Johnson O'Malley budget nationally is $28,000,000. It would take only a small effort to demonstrate that all this money and more could be used for bridge building between Indian communities and public schools. Funds could be used for parental costs, extracurricular travel, study center/libraries located within the Indian community, teacher aides placed in the Indian community. There are now four States where JOM funds are administered not by the States, but by Inter-tribal groups. And, under at least one of these contracts, parental costs are not given to the school districts but are administered through the Indian community.

Why not take the next logical step and administer all the funds through the Indian communities? That would clear out any apparent conflict with Title IV funds and would fill some critically unmet needs. These clearly separate programs could be justified before Congressional Committees or anywhere else.

MJ/lce: 11/27/72

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 26 1972

Dear Senator Kennedy:

Thank you for your letter of August 17, expressing concern over the delay in promulgating the new Johnson-O'Malley regulations.

As you know, the revised regulations have gone through numerous drafts since the Bureau of Indian Affairs prepared its first draft of revised regulations governing the administration of the Johnson-O'Malley Act. During the past year, drafts containing major changes have been considered by a special Bureau of Indian Affairs advisory groups and circulated to tribes and interested parties. As you might well have guessed, not all of those who reacted to the proposed regulation changes agreed with those changes. Many have opposing ideas and feelings.

The proposed regulation is currently being revised in light of comments received as well as the effect of the recently passed P.L. 92-318 and will soon be under consideration in this Department.

Sincerely yours,

(sgd) Harrison Loesch

Assistant Secretary of the Interior

Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

THE JOHNSON O'MALLEY ACT (1934)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior is hereby authorized, in his discretion, to enter into a contract or contracts with any State or Territory having legal authority so to do, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory, through the qualified agencies of such State or Territory, and to expend under such contract or contracts moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State.

SEC. 2 That the Secretary of the Interior, in making any contract herein authorized with any State or Territory, may permit existing school buildings, hospitals, and other facilities, and - all equipment therein or appertaining thereto, including livestock and other personal property owned by the Government, under such terms and conditions as may be agreed upon for their use and maintenance.

SEC. 3 That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations, including minimum standards of service, as may be necessary and proper for the purpose or carrying the provisions of this Act into effect: Provided, that such minimum standards of service are not less than the highest maintained by the States or Territories with which said contract or contracts, as herein provided, are executed."

P.L 74-638 Act of June 4, 1936
Amendment to the Johnson O'Malley Act

"That the Secretary of the Interior be, and hereby is, authorized, in his discretion to enter into a contract or contracts with any State or Territory, or political subdivision thereof, or with any State university, college, or school, or with any appropriate State or private corporation, agency, or institution, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory, through the agencies of the State or Territory or of the corporations and organizations hereinbefore named and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory."

CODE OF FEDERAL REGULATIONS

SUBCHAPTER E--EDUCATION

PART 33--Enrollment of Indians in Public Schools

SECTION 33.4 Contracts with Public Schools

(b) The program will be administered to accommodate unmet financial needs of school districts related to the presence of large blocks of nontaxable Indian-owned property in the district and relatively large numbers of Indian children which create situations which local funds are inadequate to meet. This Federal assistance program shall be based on the need of the district for supplemental funds to maintain an adequate school after evidence of reasonable tax effort and receipt of all other aids to the district without reflection on the status of Indian children.

(c) When school districts educating Indian children are eligible for Federal aid under Public Law 874, 81st Congress (64 Stat. 1100), as amended, supplemental aid under the act of April 16, 1934, supra, will be limited to meeting educational problems under extraordinary or exceptional circumstances.

(22 F.R. 10533, Dec. 24, 1957, as amended at 23 F.R. 7106, Sept. 13, 1958)

Appendix B2

JOHNSON O'MALLEY FUNDING OUTSIDE OF SCHOOLS

(Direct Community Funding)

With some notable exceptions, schools are the only service organizations in existence which operate on the fundamental belief that the recipients of their services (pupils and indirectly, parents) have no business evaluating the quality of those services. And, if the parents or students offer a judgment, they are told they have a deficiency in their taste buds.

When school districts are asked to account for an apparent failure in educating Indian students, their answers tend to be the same all over the country: (1) There is a lack of support for education from the parents and the Indian community generally; (2) The home environment is not conducive to learning. Home environment is usually interpreted so broadly that it includes language, lack of electricity, the absence of books in the home, and the failure to provide individual study halls.

These school arguments rest on one basic and fallacious argument: Learning is an activity that takes place only in school. Although it is safe to bet that no one alive and breathing believes that to be true, schools as an institution believe it to be true of "others."

The only parents who "support" schools are those who are either satisfied or complacent products of those schools or parents who have no idea what goes on in schools but think they must be "a good thing" because their children find it difficult. Finley Peter Dunne on kindergartens: "I don't care what you do to them just so long as they don't like it." Most Indian parents are being asked to support an unknown quantity with the specific understanding that critical judgments are limited to approval. In fact, you

can't give active support to any program unless you have both the means and the freedom to know what is worth supporting and what isn't.

Historically, Indian parents have viewed schools as a one-way road to assimilation and out of the community. How could they do otherwise? This was the stated policy. Now the rhetoric has changed. School people who didn't know the word "bi-cultural" ten years ago can't make a speech without that protective reference. But the rhetoric makes no difference. As long as schools are viewed as the one seat of learning, they do represent one-way roads --- out.

The Coleman report, the Jencks report, virtually all of the current literature on education agree on one essential point: Schools, no matter how well funded or commendable they might be, are incapable of fulfilling what has come to be known as their social promise.

It isn't that Indian communities have no interest in education. It is simply that they are unwilling to accept a narrow definition developed by outsiders. For example, Alaskans have asked for the development of educational materials explaining the Alaskan Claims Settlement, and they want the course to jointly serve high school students and adults. New Mexico Pueblos have consistently requested funding for libraries and study centers located in the Pueblos. Most of the Indian students in the country are unable to participate in the non-academic life of the school because of lack of transportation and lack of money. Johnson O'Malley sometimes takes care of these needs now, but those instances are the exceptions, not the rule. The Albuquerque Public School system provides $12,000 in JOM funds for extra-curricular transportation for 243 eligible students. This is the highest expenditure of this type in the State, but it is what both

the district and the two Indian communities served believe is necessary just to enable their students to be a part of the school.

Perhaps community education groups would develop programs that would be totally different from school courses -- Indian culture, etc. Or maybe they would go to the other extreme and duplicate the kinds of courses already being offered in the school. That's not important. What is important is that the parents and students would have an opportunity to define their own educational needs, to act on them, and to change them when they didn't work.

Federal definitions of educational need are based on necessary bureaucratic distinctions -- public school pupils, BIA pupils, adult basic education. Indian communities should be free to ignore these separations and define their own educational needs. JOM planning funds could be distributed on a straight equalized formula basis and all of the decisions from then on and all the definitions of educational need could be left to the community. Would there be waste and inefficiency? Absolutely. But compared to what? Certainly not to the present JOM. It would take another 30 years to develop as dismal a track record. Certainly not to the present performance level of school special programs. If educators are going to talk about the educational responsibilities of the Indian communities, they'll have to give those communities some of the responsibility.

MJones/lce: 12/8/72

Appendix C

INDIAN EDUCATION ACT

1973-74 School Year

GALLUP-McKINLEY COUNTY PUBLIC SCHOOLS

Title of Service or Supportive Service:

McKinley County School Lunch Program Supplementary Fund to defer added costs of meals served to Indian students and increase quality of food for Indian students.

Item No. VI

Objectives:

1) to help offset increase of food costs not covered by present reimbursement and the decrease in USDA commodity receipts
2) to increase quality of foods purchased
3) to raise salaries in order to hold present employees and assure that all minimum wage requirements are met
4) to offset the difference in payments received from the paying student and from USDA and Johnson-O'Malley reimbursed students

Implementation: Grades 1-12

1) Claim 7¢ reimbursement on all meals served Indian students to offset decrease in commodity receipts.
2) Purchase 100% meat products, use no extender of any kind, and purchase only

from USDA and Johnson-O'Malley reimbursed students

Implementation: Grades 1-12

1) Claim 7¢ reimbursement on all meals served Indian students to offset decrease in commodity receipts.
2) Purchase 100% meat products, use no extender of any kind, and purchase only quality canned foods.
3) Increase salaries of all employees at the rate of 5% of present salaries. (Includes 103 Indian cooks or 62%)
4) Claim the difference between the amount received from paying students and USDA and Johnson-O'Malley students.

Evaluation:

	Elementary	Secondary
JO	595	505
USDA	4670	2523
	5265 @ 5¢	3028 @ 10¢ per da.
Totals	$ 47,385	$ 54,504

1) Differential between reimbursement and costs will be offset
2) Quality of foods will be improved
3) Trained employees will remain with the system
4) Income level will be maintained
5) The Indian Parent Committee will assist in the evaluation.

Estimated Budget:

Staff	$ 23,019.
Supplies	76,981.
Total Direct Charges	$100,000.
Indirect Charges 4%	4,000.
TOTAL	$104,000.

VI. 1. Due to increased prices of staples the cost of operating the School Lunch program in the district has increased above the reimbursement increase.

2. Due to the unavailability of USDA commodities, the cost of operating the School Lunch program in the district has increased.

3. Due to the fact that most of the meals served in the School Lunch program in this district are "free or reduced", approximately 78% must continue to be "free or reduced." Assurance of funding is required if the normal quality and quantity of food is to be served.

4. In the predominantly Indian communities the School Lunch employees are Indian people who often are the sole support for their families. A wage increase is needed which is impossible under present funding.

The school district is increasing in student enrollment at approximately 5% per year, most of which growth is and has occurred in the rural areas.

The school district is using approximately 150 portable classrooms in addition to permanent facilities due to continued growth especially in the rural areas, coupled with a statutory limit on bonding capacity and the cessation of Public Law 815 funding. Housing for teachers is of necessity provided by the district outside of Gallup.

The housing shortage for both pupils and teachers available outside of Gallup makes the addition of any new program restricted to activities requiring little or no space for either pupils or teachers, or the project must include the housing for teachers and space for the program.

The school board, five members, is elected at large. Three of the five present members are Indian, Navajo, and two are non-Indian.

The budget for the district included for 1972-73 approximately $3 million of Public Law 874 funds, $1 million Johnson-O'Malley funds, approximately $1 million local funds, $6.6 million state funds, and $2 million bond funds. The average operational cost per student, (not including bond funds), will be just under $1000 for 1972-73 in basic program items.

The average pupil-teacher ratio in the basic program was just under 24 pupils per teacher, 1972-73. Total teaching personnel was approximately 550 plus federal projects other than kindergartens. The use of community people as aides and teachers, if qualified, has been a strength of the district teaching-learning program. Total employees for the district is approximately 1200.

The average cost per pupil in this district is above the average for the state because of distances, sparsity, and geographical area served and our insistence on a lower than average pupil-teacher ratio when compared with schools this size in the state.

This district is one of the largest in area in the United States. We rank number three in pupils enrolled in the state of New Mexico and have been told that we enroll the greatest number of Indian students of any district in the nation.

The rurality and sparsity of population in our district is indicated by the fact that 7202 students were regularly transported during the month of October 1972. One hundred six (106) buses and thirty (30) feeder vehicles traveled approximately 96,440 miles during October 1972 in transporting students to schools in the district. Activity trips totaled 23,000 miles for the district

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The school lunch program in the district has expended during 1972-73 approximately $100,000 more than all reimbursements and income from paid meals. This is due to price increase in staples, decrease in commodities supplied, and our attempt to maintain the quality and quantity of meals. During October 1972 a total of 197,741 meals were served plus 36,485 breakfasts. Of the 197,741 meals served, 44,171 were paid for, leaving 153,570 as free or reduced price meals. Approximately 63% of our cafeteria employees are Indian women. Unless some source of funding is found for 1973-74, no salary raises will be possible for these employees.

Appendix D.

JOHNSON O'MALLEY COMPARISON OF STATE FUNDING

(by Control Category)

TRIBAL or INTER-TRIBAL CONTROL		DIRECT CONTROL (Contracted to School District)		STATE CONTROL	
Nebraska	$ 670,000	Colorado	287,000	Montana	1,080,000
North Dakota	740,000	Florida	10,000	Wyoming	135,000
South Dakota	1,640,000	Mississippi	15,000	Alaska	4,859,000
New Mexico	1,488,000	Oregon	71,000	Oklahoma	2,140,000
Minnesota	1,350,000	Kansas	102,000	New Mexico *(Navajo)*	2,000,000
Wisconsin	460,000	Iowa	150,000	Nevada	245,000
Michigan	140,000	*Peripheral (NAVAJO)*	*2,105,000*	Idaho	485,000
		Utah	10,000	Washington	1,025,000
		Oregon	71,000	Arizona	3,785,000
				California	350,000
	$ 6,488,000		*$ 2,821,000*		*$ 16,104,000*

TABLE I: Expected Distribution of Funds

AREA State	Amounts 1973	 1974	 Increase Decrease
ABERDEEN			
Nebraska	$ 673,000	$ 670,000	(-) 3,000
North Dakota	750,000	740,000	(-) 10,000
South Dakota	1,650,000	1,640,000	(-) 10,000
ALBUQUERQUE			
Colorado	286,081	287,000	(+) 919
New Mexico	1,487,919	1,488,000	(+) 81
ANADARKO			
Kansas	80,000	102,000	(+) 22,000
BILLINGS			
Montana	1,080,000	1,080,000	
Wyoming	135,000	135,000	
JUNEAU			
Alaska	4,859,000	4,859,000	
MINNEAPOLIS			
Minnesota	1,350,000	1,350,000	
Wisconsin	460,000	460,000	
Iowa	150,000	150,000	
Michigan	120,000	140,000	(+) 20,000
MUSKOGEE			
Oklahoma	2,125,000	2,140,000	(+) 15,000
Mississippi	10,000	15,000	(+) 5,000
NAVAJO			
New Mexico	2,000,000	2,000,000	
Peripheral	2,105,000	2,105,000	
PHOENIX			
Arizona	3,835,000	3,785,000	(-) 50,000
Nevada	245,000	245,000	
Utah	10,000	20,000	(+) 10,000
PORTLAND			
Idaho	485,000	485,000	
Washington	1,025,000	1,025,000	
Oregon	71,000	71,000	
SACRAMENTO			
California	350,000	350,000	
SEMINOLE			
Florida	10,000	10,000	
TOTALS	$25,352,000	$25,352,000	00000

DRAFT

Appendix E

TITLE IV, Part A -- EDUCATION COMMITTEES

SECTION 305 (b) -- an application by a local educational agency or agencies for a grant under this title may be approved only if it is consistent with the applicable provisions of this title and

(1) meets the requirements set forth in subsection (a);

(2) provides that the program or project for which application is made

(a) will utilize the best available talents and resources (including persons from the Indian community) and will substantially increase the educational opportunities of Indian children in the area to be served by the applicant; and

(b) has been developed

(i) in open consultation with parents of Indian children, teachers, and, where applicable, secondary school students, including public hearings at which such persons have had a full opportunity to understand the program for which assistance is being sought and to offer recommendations thereon, and

(ii) with the participation and approval of a committee composed of, and selected by, parents of children participating in the program for which assistance is sought, teachers and where applicable, secondary school students of which at least half the members shall be such parents.

(c) sets forth such policies and procedures as will insure that the program for which assistance is sought will be operated and evaluated in consultation with, and the involvement of,

parents of the children and representatives of the area to be served, including the committee established for the purposes of clause (2) (b) (ii).

Amendments of applications shall, except as the Commissioner may otherwise provide by or pursuant to regulations be subject to approval in the same manner as original applications.

EDUCATION COMMITTEES

Present types of Education Committees --

(1) Education Committees selected by the Tribal Council

(2) Education Committees selected by the Tribal Chairman or Governor

(3) Education Committees selected by the School Superintendent or School Board

(4) Education Committees selected by a formal parents caucus or Indian Parents Association

(5) Education Committees selected by an informal caucus of Indian parents

(6) Education Committees chosen by themselves

(7) Education Committees selected from nowhere (six people went to a meeting and became the education committee through the absence of everyone else)

(8) Education Committees chosen through a formal electoral process

(9) Education committees chosen through an informal electoral process (all those interested in voting for the Committee were invited to one particular meeting. All tribal members were allowed to vote.)

(10) Phantom education committees (The school lists parents as members of a committee when applying for funds, but no one on the committee

is aware of membership)

(11) Education Committees selected by Indian School Board members, or one Indian School Board member in districts where the School Board is both Indian and non-Indian.

COMPOSITION OF COMMITTEES

(1) The legislation calls for three groups to be represented on the Committee -- (a) parents, who are to be selected by parents; (b) teachers; (c) secondary students where applicable.

If parents are to become more involved in the school or even to have a controlling voice within the Committee, it is recommended that the committee be constructed on a 2-1-1 ratio. That is, 6 parents, 3 teachers (acceptable to parents) 3 students, or 12-6-6, It would also be helpful to follow the Title I precedent of setting up subcommittees for target schools or out of school target programs, and these committees should follow the 2-1-1 ratio. (NOTE: Parent, in this case, should be interpreted broadly to include guardians.)

The rationale is based on the history of school/community relations. Traditionally, meetings have been held at the schools rather than in the community which would virtually guarantee that any committee with a 50% teacher representation would meet on its own time, on its own turf, and would control the committee. If the committee is 2/3 parents, it can set the time and place for meetings and maintain its perogatives.

(2) Many school districts now have three or four education committees: Johnson O'Malley, Title I, Title III, etc. There should be no restriction placed on committee membership, and if there is no

overlapping membership on all categorical committees, provisions should be made so that members of this education committee can serve at least as ex-officio members of the other categorical committees. If this is not done, it will be a simple matter for school districts to use new funding to supplant other supplementary programs. It is also impossible for any committee to be involved in planning supplementary programs without full knowledge both of the basic program and all other supplementary programs.

SELECTION PROCESS -- A distinction should be made between reservation and off-reservation communities.

(1) RESERVATION COMMUNITIES

- (a) Where there is more than one tribal group in attendance at a school district, the parents committee should have representatives from all tribes; e.g., the Bernalillo school district has students from five Pueblos. The education committee for the school district has ten members, two from each of the five tribes.

(b) This same principle should apply to the subcommittees set up for target schools. It is also recommended that these subcommittees are composed only of parents from those particular schools.

(c) Notices that will begin the process of committee selection should be sent to the tribal leaders, tribal councils, school board members, superintendents and all the schools within the district that have Indian students, and existing Indian education committees. Committees could then be selected either through a

direct election process or through a convention or caucus (enfranchisement through concern). At least three weeks notice should be given and the election or selection should take place in a location or locations easily accessible to all parents. (This election or selection process should be described in all grant applications.)

(d) In the case of most Pueblos, only the Governor has the power to give committees authority. A committee selected without his sanction would not be able to act.

(e) In many other tribes, although the Chairman and council members have been chosen by the electoral process, it has been the custom for the chairman or council to simply name an education committee. Once the tribe has followed an election process for its own overall leadership, it's hard to see why they should not do the same with this committee so as to insure parental choice and membership.

(f) Applications should also demonstrate the manner in which this education committee will have a direct tie-in with other education committees (Title I, JOM, overall education).

(2) OFF-RESERVATION SELECTION PROCESS

(a) In most large urban areas, there is a great diffusion of Indian students. One or two schools may have more than 25, or even more than 200 and the rest will have no more than five or six. In these cities, notification of the beginning process should go both to the school superintendents, obvious target schools, and urban Indian organizations. Here, perhaps, the process for reservations should be reversed, and the target subcommittees should be selected first. They could then select one district-

wide committee from their membership. The principle is the same; giving assurance that those parents whose students are directly effected by the programs will be the parents most involved.

Because of the diffusion, it is also recommended that the funding system both in cities and in all other schools be based on the number of participants and not on the total Indian population within the districts. Per pupil expenditure within the district can then represent a maximum rather than an entitlement.

In off-reservation rural areas, the committees can also be formed on the basis of obvious target schools guaranteeing committee representation for each individual school's Indian community. They can then select from their membership in forming a district-wide committee.

As in reservation communities, the selection process followed should be documented in each program application.

EVALUATION AND MONITORING

In addition to the usual program goals such as "increasing students' self awareness, self esteem," etc. which can be measured only by God, all programs should have some goals that are subject to the accountability of mortals generally and education committee members specifically. If, for example, the program wishes to improve the students' abilities to read English, what is their measurable expectation?

Although everyone except perhaps the developers of standardized tests has pointed to their cultural biases, those tests are frequently reasonably accurate reflections of culturally biased curricula. There are ways to measure whether or not a school district is achieving its goals. Whether or not it should have

those goals in the first place is a separate question. The issue on program evaluation should be: (1) What does a school want to do with a particular program? (2) How will it know whether or not it has been successful? (3) How will the parents be able to evaluate the relative success or failure of the programs?

An established pattern has been for school districts to hide all "objective" evaluation material from the parents and then to feel harrassed because parents raise objection on subjective grounds.

As part of protective evaluation procedures, a checklist could be developed that would show that the committee had access to (1) basic school budget; (2) State minimum standards; (3) Standardized test scores; (4) other categorical program information, including evaluations.

MJ/lce: 11/27/72

Appendix F

THE ARIZONA REPUBLIC
Wednesday, April 19, 1972 ☑O Page 21

Indian schools need more aid, state tells U.S.

By DAVID FITZPATRICK

Copyrighted material deleted

Appendix G

ARIZONA

Since the State of Arizona boasts a large Indian population, it has been actively involved with the Johnson-O'Malley Program since its inception. The first contract was for $33,000 with 553 Indian students participating for the year 1939. Prior to the 1939 contract, agreements were made with individual school districts.

Although the law does not spell out the Congressional intent of the Johnson-O'Malley legislation, the Bureau has held that Johnson-O'Malley financial assistance for the education of Indian children is supplemental in nature and should be limited to meeting financial needs after all other resources have been exhausted.

The regulations promulgated by the Secretary of the Interior for carrying out the Johnson-O'Malley program are set forth in 25, CFR, 33.4, provide in part, that:

> "(b) The program will be administered to accommodate unmet financial needs of school districts related to the presence of large blocks of nontaxable Indian-owned property in the district and relatively large numbers of Indian children which create situations which local funds are inadequate to meet. This Federal assistance program shall be based on the need of the district for supplemental funds to maintain an adequate school after evidence of a reasonable tax effort and receipt of all other aids to the district without reflection on the status of Indian children."

Also, it should be noted that during the 1969 appropriation hearings before the Sub-committee on Department of the Interior and Related Agencies, House Committee on Appropriations, Bureau officials were asked to place in the record the Bureau's legal position concerning the responsibility for educating the Navajo Indian children on the reservation and for Johnson-O'Malley payments to Arizona. The information that the Bureau inserted in the record reads, in part, as follows:

> "EDUCATION A STATE RIGHT AND RESPONSIBILITY"
>
> "Thus the Bureau of Indian Affairs takes the position that the Indian child, as a citizen of the State, has a right to the same education program as the State provides for other citizen children. This is in keeping with the basic concept in this country; namely, that education is a responsibility of the State. The State of Arizona in Article XX, section 7 of its constitution, has the same legal basis for this concept through 'Provision shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all children of the State and be free from sectarian control, and said schools shall always be conducted in English."

During the annual budget presentations before the congressional appropriations committees, the Bureau has repeatedly stated the Johnson-O'Malley funds were used to assist school districts in which the tax-free status of Indian lands had created "unmanageable financial problems after all other financial resources to the district have been exhausted."

The Bureau stated that Johnson-O'Malley funds were provided to school districts (1) located on Indian reservations, which had little or no local tax resources and which were unable to operate at acceptable State standards without assistance over and above their entitlement under Public Law 874, (2) for other extraordinary or exceptional circumstances, after all other aids had been fully exhausted, and (3) to meet the full per capita costs for education of Navajo children living in Federal dormitories in school districts of which they were not residents.

The constitution of the State of Arizona, like other states does provide state responsibility for the education of its citizens. This, however, does not preclude the Federal Government from making heavy investments in education.

Federal policy has been and continues to be, to shift the basic responsibility to states for the education of Indian children. The Johnson-O'Malley Act program has contributed greatly toward that goal in the State of Arizona. The development of local school districts on reservations and the operation of these schools, largely by Indian school boards would not have been possible without Federal aid and flexibility in administering the Johnson-O'Malley Act program.

Our present Johnson-O'Malley Plan signed October 6, 1969, by a representative of the Bureau of Indian Affairs, and August 26, 1969, by the Superintendent of Public Instruction for the State Board of Education, State of Arizona is an effective instrument to define an objective basis on which Johnson-O'Malley funds may be programed to eligible school districts.

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pp. 19-68

OREGON

The State of Oregon joined the Johnson-O'Malley family of States in the fall of 1971, (FY-1972) with four contracts totaling $48,500. These contracts provided for tutoring services, teacher aides, home-school coordinators, and training for JOM Parent Committees.

Johnson-O'Malley funds were allocated by the Portland Area Office to the Warm Springs and Umatilla Agencies, who in turn contracted with four school districts, providing special services to an Indian enrollment of 967.

All contracts were aimed at reducing the dropout rate of Indian students and decreasing the need for seeking boarding school enrollment.

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p. 70

UTAH

The Utah Johnson-O'Malley Program is operated by agreements made with individual school districts. In 1970, a contract for $11,223 was entered into with the Tooele County School District to educate 16 Indian children enrolled in that district. Utah Johnson-O'Malley agreements have been in effect since 1951.

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P.P. 72-78

TOTAL JOHNSON-O'MALLEY EXPENDITURES AND ENROLLMENT

Year	Amount	Number Students
1951	$2,505,933	29,118
1956	5,387,123	36,093
1958	7,055,515	38,810
1960	5,045,910	40,578
1962	6,470,636	42,813
1964	7,424,676	46,742
1966	8,520,727	54,848
1968	9,861,536	62,676
1970	16,392,286	72,065
1971	19,652,000	78,758
1972	22,652,000	86,765

Public Schools Served by Johnson-O'Malley Funds

FY - 1972

Total Number School Districts	437
Total Enrollment	687,153
Indian Enrollment	80,323
Percent Indian Enrollment	11.7%

Appendix II

PROPOSED JOHNSON-O'MALLEY REGULATIONS

Jointly Submitted By:

Alaska Federation of Natives
All-Indian Pueblo Council of New Mexico
American Association of Junior and Community Colleges
American Indian Law Center
Americans for Indian Opportunity
California Indian Legal Services
Coalition of Eastern Native Americans
Coalition of Indian-Controlled School Boards
Dinebeiina Nahiilna Be Agaditahe
Harvard University Center for Law and Education
Indian Education Talent Search
Indian Education Training, Inc.
Indian Legal Information Development Service
Institute for the Development of Indian Law
Intertribal Council of California, Inc.
Intertribal Council of Nevada
Mississippi Band of Choctaws
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Businessmen, Indian Youth Programs
National Congress of American Indians
National Education Association
National Education Association, First Americans Task Force
National Indian Education Association
National Indian Lutheran Board
National Indian Youth Council
Native American Center of Oklahoma City
Native American Legal Defense and Educational Fund, Inc.
Native American Lobby
Native American Rights Fund
Native American Training Associates Institute
Nebraska Indian Intertribal Development Corporation
Nevada Indian Legal Services
Northern Pueblos Council of New Mexico
Oklahoma Indian Education Association
Small Tribes of Western Washington
Tanana Chiefs Conference
United Scholarship Service
Western Interstate Commission on Higher Education
The Navajo Tribe

February 28, 1974

INTRODUCTION

On January 11, 1974, Commissioner Thompson published proposed Johnson-O'Malley regulations and invited comments on them. This document constitutes the response of the undersigned groups.

The proposed regulations set forth here were adopted only after careful and extensive study. Three separate drafts have been circulated. In addition, memoranda have been circulated dealing with individual issues. Changes have been made in accordance with suggestions made by people in the field of Indian education. A two-day meeting was held in Albuquerque on February 7 and 8, 1974. Approximately 40 people attended the meeting, which was open to all who wished to attend. All of the major Johnson-O'Malley states were represented at the meeting. The Albuquerque conference was a true work session -- each meeting began early and ended late. Thus these proposed regulations represent the hard work and, we think, substantial expertise, of a very large number of representatives from the participating organizations.

Some of the participating groups do not agree with all of the specific provisions of the proposed regulations, but the disagreements are few. The primary concerns are with the definition of "Indian" in subsection 33.1(c) and with the question of whether Johnson-O'Malley funds should

be expended only in areas "on or near" reservations, an issue which is covered in subsection 33.2(b). Some of the participating groups will advise the Commissioner of their individual positions on these issues. The great majority of the provisions in these proposed regulations, however, are supported vigorously by the participating groups.

We are aware that some people in the BIA think that many matters covered by these proposed regulations should be dealt with in the BIA Manual. We oppose such an approach. The BIAM is strictly an "in house" document which is unavailable to Indian parents and others working in the field. The Indian people are not only entitled to have legal rights, such as provided by these proposed regulations, but also to be informed as to what those rights are. This can occur only if the relevant rules are given the force of law, published, and widely distributed.

We see this as a perfect opportunity for the Bureau of Indian Affairs to use Indian people and Indian education groups as resources. We think it entirely fair to say that these proposed regulations have been drafted with full recognition of the restraints on the Bureau of Indian Affairs. At the same time, we have sought continually to focus upon the foremost goal: to provide quality education to the Indian children who so badly need it. We believe that these proposed regulations are a major step toward that goal and look forward to working with the Bureau of Indian Affairs in order to reach that goal.

GENERAL STATEMENT

The following is a proposed revision of the Johnson-O'Malley regulations. We have not used the Proposed Rules which were published on January 11, 1974 (hereafter "1974 Proposed Rules", attached as Appendix D) as a departure point. In our judgment, the 1974 Proposed Rules are totally inadequate to the point that they cannot even be used as a basis for constructive discussion. Accordingly, although most of the inadequacies of the 1974 Proposed Rules are implicit in the comments below, our presentation here affirmatively proposes Johnson-O'Malley regulations and is not offered in the format of comments on the 1974 Proposed Rules. Specific listings of the many inadequacies of the 1974 Proposed Rules have been separately submitted by many of the undersigned groups.

The proposed revisions refer to the last of several drafts which were discussed in late 1972, when the Bureau of Indian Affairs was seriously considering a revision of the present Johnson-O'Malley regulations. The last 1972 draft (hereafter "1972 draft") was, we understand, approved by the Director of Indian Education in the Bureau of Indian Affairs. Many Indian groups were consulted and offered suggestions which were incorporated into the 1972 draft. Accordingly, although some areas of the 1972 draft should be improved upon, we do believe that reference should be made to it. For convenience, a copy of the 1972 draft is attached as Appendix C.

Before moving to the actual text of the proposed regulations, we will offer one suggestion which serves as an overview of what the Johnson-O'Malley regulations should contain. The third paragraph of the preamble to the 1974 Proposed Rules, which states the purpose of the revision, now reads as follows:

> "The purpose of this revision is to clarify the eligibility requirements for educational programs for Indian students under these regulations."

Although eligibility is definitely a problem area, there are several other issues which badly need attention. Accordingly, we believe that the purpose clause in the preamble should refer to "supplemental, special educational programs" and should also include the following language:

> "In addition, this proposed revision will increase the participation of Indian parents, will delineate specific areas of accountability, and will provide review and monitoring procedures so that funds provided under this part can most effectively be used for supplemental, special programs to further the education of the Indian children who are the intended beneficiaries of these funds."

The proposed revisions are, in the judgment of the participating groups, a simple, sensible means of achieving the goals set forth above -- goals which are, we suggest, shared by all who are concerned with improving the education of Indian children. All of the participating groups will look forward with interest to learning of the Commissioner of Indian Affairs' position on the following proposed revisions. We believe that these proposed revisions should remain substantially intact and should be adopted as the new Johnson-O'Malley regulations. We also request that

the comments following the regulations be published as an aid to interpretation.

PROPOSED JOHNSON-O'MALLEY REGULATIONS

PART 33 -- Special Programs for the Education of Indian Children

Comment: The former title of this part is "Enrollment of Indians in Public Schools". The suggested title is more representative of the thrust of the Johnson-O'Malley program; even under the present regulations, most Johnson-O'Malley money is intended for "special programs". Furthermore, the "public school" limitation is not appropriate, since many eligible Indian children attend private schools, including Indian-controlled schools.

Section

33.1 Definitions

33.2 Eligibility

33.3 Community Participation

33.4 Applications

33.5 General Requirements for Contracts

33.6 Review, Monitoring, and Withholding of Funds

33.7 Public and Private School Use of Federal Property

33.8 Periodic Review of Regulations

Authority: The Act of April 16, 1934, 48 Stat. 596, as amended by the Act of June 4, 1936, 49 Stat. 1458 (25 U.S.C. §§452-56).

§33.1 Definitions

Whenever used in this part, the following terms shall have the indicated meaning:

(a) "State" means a State of the United States of America or any subdivision.

(b) "School District" means the local unit of school

administration as defined by the laws of the State in which it is located.

(c) "Indian" means an individual who is a member of a tribe, band, or other organized group of Indians, including Alaska Natives, which is recognized by the Secretary of the Interior as being eligible for Federal Services.

Comment: The above three subsections are taken from the 1974 Proposed Rules.

The definition of "Indian" is significant because it is one of several provisions in these regulations which avoid duplication with Title IV of the Indian Education Act. "Indian", within the meaning of these proposed regulations, includes only those Indians eligible for BIA services. "Indian" is given a much broader definition in Title IV. See, 20 U.S.C. §1221h.

(d) "Parent contracting institution" means any Indian-controlled tribal, state or federal corporation which desires to contract directly with the Commissioner of Indian Affairs for funds under this part and which has been selected pursuant to the nomination and selection procedures of subsection 33.3(c) of this part.

Comment: The definition of "parent contracting institution" is necessary in order for the Commissioner of Indian Affairs to be able to contract directly with parent groups. This concept is discussed in more depth in a paper entitled "Johnson-O'Malley" dated January 28, 1974, prepared by Indian Education Training, Inc. The paper, which is attached as Appendix E, provides a good discussion on the issue of parent contracting as well as on other problem areas concerning Johnson-O'Malley. This definition should assure that any parent contracting institution will be representative of the community, since the nomination and selection procedures of subsection 33.3(c), below, will be utilized.

The requirement that the parent contracting institutions be incorporated is necessary to qualify parent contracting institutions as eligible contractors under the Johnson-O'Malley Act, which specifically permits contracts for Johnson-O'Malley funds with "any state or private corporation". See, 25 U.S.C. §452.

We emphasize that it is entirely optional, and not mandatory, as to whether the Secretary wishes to contract with a parent contracting institution. See, subsection 33.2(a) below, which provides that the Secretary "may" contract with any educational agency.

§33.1 (continued)

Thus this significant move toward self-determination is not forced upon the Secretary, but rather can be developed at an appropriate pace, perhaps by the use of demonstration groups.

(e) "Indian-controlled" means any entity, the governing board of which is composed of a majority of persons who are Indians within the meaning of subsection 33.1(c) or who possess at least one-quarter or more American Indian blood.

Comment: This subsection is necessary because the phrase "Indian-controlled" is used several times in these proposed regulations.

(f) "Educational agency" means any state, school district, state university or college, state or federal corporation, Indian tribe, intertribal corporation, corporation chartered or created by any Indian tribe, parent contracting institution, and any public or private Indian-controlled school or institution. Any such educational agency shall be directly involved in providing educational services to Indian children.

Comment: The first sentence of this subsection is similar to subsection 33.1(a) of the 1972 draft. The recommendation here adds Indian tribes and parent contracting institutions to the definition of "educational agency". Distribution of these funds can properly be made to tribes and to parent contracting institutions under the broad terms of 25 U.S.C. §452, which permits contracting with "any appropriate state or private corporation, agency, or institution". The same provision permits contracting with intertribal corporations.

The second sentence, requiring direct involvement in providing educational services, serves specifically to eliminate as eligible contractors groups such as law firms, national organizations, and field training programs. The reasoning is that the regulations should make it clear that Johnson-O'Malley funds must go to contractors who have a direct relationship with Indian children. The "directly involved" phrase in the second sentence should be read broadly enough to permit contractors to expend funds on parental costs or programs involving parents, so long as such programs are designed to help the parents improve the education of

§33.1 (continued)

their own children. Use of funds for such parent-related purposes is permitted by subsection 33.5(a), below, which refers to the "financial station" of the parents.

(g) "Commissioner" means the Commissioner of Indian Affairs or any person to whom he has given written authority to act as his agent or representative in regard to duties or responsibilities under this part.

Comment: The "written authority" provision should enhance accountability. In the past, it has been almost impossible to determine who in the BIA has made crucial decisions concerning Johnson-O'Malley funds. Presumably, the requirement of such written authority will at least permit easy determination of the BIA official to whom inquiries should be made.

We think it important that the authority to implement the Johnson-O'Malley program be delegated to a central educational contracting authority. The Coalition of Indian Controlled School Boards has made this recommendation to the Commissioner in a paper dated January 18, 1974. The paper is attached as Appendix F. We strongly believe that this proposal should be adopted in conjunction with these regulations so that a body with much-needed expertise in contracting can be in operation as soon as possible.

§33.2 Eligibility

(a) Contracts may be entered into under the provisions of the Act of April 16, 1934, 48 Stat. 596, as amended by the Act of June 4, 1936, 49 Stat. 1458 (25 U.S.C. §§452-56), with authorities of any educational agency for the education of Indian children from early childhood through grade twelve. Preference shall be given to parent contracting institutions and to all other Indian-controlled educational agencies. Nothing in this part shall prevent the Commissioner from contracting with educational agencies who will expend all or part of the funds in places other than the public or private schools in the community affected.

§33.2 (continued)

Comment: The first sentence of this subsection is similar to the 1972 draft, except that funds may be used for children in "early childhood". We believe that "early childhood" is preferable to kindergarten: such a provision will permit parents, if they so desire, to use Johnson-O'Malley funds in Head Start, pre-Head Start, and other pre-school programs. The "early childhood" provision is another area in which these proposed regulations avoid duplication with Title IV, which is limited to "elementary and secondary programs". See, 20 U.S.C. §245aa(a). The limitation as to grade twelve is found in subsection 33.2(a) of the 1974 Proposed Rules and is reasonable in light of the existing BIA assistance for post-secondary education.

The provision permitting the expenditure of Johnson-O'Malley funds outside the formal school system is necessary, because it gives parent groups autonomy from the local school system, if the Commissioner believes such autonomy to be appropriate under the circumstances.

(b) The program under this part shall be administered exclusively to meet the special, supplemental educational needs of Indian children, without regard to the amount of non-taxable, Indian owned property in the district.

Comment: This subsection is taken from subsection 33.2(b) of the 1971 draft.

The stated, plain intent of Congress is that the Commissioner should disregard the existence of non-taxable, Indian-owned property in determining eligibility for Johnson-O'Malley funds. When the Johnson-O'Malley legislation was originally passed in 1934, the Senate Committee Report stated that the Act was "particularly" intended to provide for Indians in "those States in which the Indian tribal life is largely broken up and in which the Indians are to a considerable extent mixed with the general population". S.Rep.511, 73d Cong., 2d Sess. 1 (1934). The Committee Report then dealt specifically with the question of education and indicated that Johnson-O'Malley funds were intended to be used in non-reservation areas as well as in reservation areas: "The Indians in these sections are largely mixed with the white population, and it becomes advisable to fit them into the general public-school scheme rather than to provide separate schools for them." Id. at 2.

Recent congressional intent is precisely the same. In 1972, the Senate Appropriations Committee unequivocally directed the Secretary of the Interior to make "special efforts to make Johnson-O'Malley funds available in locations whether or not there are large areas of tax-free Indian lands". S.Rep. 921, 92d Cong., 2d Sess. 6 (1972). In the same report, the committee "directs that

§33.2(b) comment (continued)

the Secretary prepare a plan to assure Bureau of Indian Affairs type services to all Indians in the United States -- rather than just to those living 'on or near reservations ". Id.

Because of the unusually specific legislative history set forth above, we think it indisputable that it would be illegal for the BIA to limit Johnson-O'Malley programs to areas near "large blocks of tax-exempt land".

The truth is that the suggested plan would comport with present BIA practices, because the BIA has consistently ignored its own "large blocks of tax-exempt land" requirement. Funds are distributed to the Omaha, Winnebago, and Santee Sioux reservations in Nebraska even though land on those reservations is taxable under the Brown-Stevens Act. In Oklahoma, there are Johnson-O'Malley programs which serve children who live on tax-exempt land as well as children who live on taxable, fee patent land. In other states, Johnson-O'Malley funds are already being expended in urban areas: in both Gallup and Kirtland, New Mexico, for example, there are Johnson-O'Malley children who live on tax-exempt reservation lands as well as Johnson-O'Malley children who live in the cities or in checkerboarded areas of the reservation. Our point is that the practices outlined in this paragraph are perfectly fair: the Nebraska, Oklahoma, and New Mexico students should continue to receive Johnson-O'Malley funds. Similarly, Indian children in areas such as California, which are now denied Johnson-O'Malley benefits, should receive the payments to which they are entitled under law. The proposed regulations would reach these desired results.

The change proposed in these regulations will not result in any major shift in expenditures from reservation areas to urban areas. As mentioned above, some urban areas are already receiving Johnson-O'Malley funds. In addition, only BIA-eligible children can be counted for Johnson-O'Malley assistance even after the proposed change. Those urban Indian children are, of course, eligible for Title IV funds, which do not duplicate Johnson-O'Malley funds in this area of eligibility.

(c) No educational agency shall be denied funds under this part due to the number of Indian children served by the educational agency.

Comment: Subsection 33.2(a) of the 1974 Proposed Rules makes a district ineligible unless it educates "large numbers of eligible Indian children". To the contrary, educational agencies with low percentages or numbers of Indian students may well have a special need for Johnson-O'Malley assistance. This is, of course, particularly true in small rural communities in areas like Alaska, Nevada, and Washington.

§33.2 (continued)

(d) The eligibility of an educational agency for federal aid under Public Law 874 (64 Stat. 1100) or any other act or provision for educational aid or assistance shall not limit the eligibility of such educational agency for aid under this act.

Comment: This recommendation is from subsection 33.2(d) of the 1972 draft.

(e) Every educational agency receiving funds under this part shall provide to Indian students their equal share of services attributable to basic support or operational funds, whether such funds are received from local, state, or federal sources. The above-mentioned services include those services already available and those which may be available in the future. In no instance shall there be discrimination against Indians in any educational agency receiving funds under this part.

Comment: The first two sentences are taken, as modified, from subsection 33.2(f) of the 1972 draft. The last sentence is taken from subsection 33.4(c) of the 1974 Proposed Rules and from subsection 33.5(d) of the present regulations.

(f) Where the educational agency is a public authority, it shall maintain and enforce, in all schools that have Indian pupils, educational standards at least equal to the minimum standards established by the state in which the educational agency is located.

Comment: This subsection is similar to the first part of subsection 33.3(d) of the 1972 draft.

(g) All funds under this part shall be distributed annually among the states and among the educational agencies within each state on an equitable basis.

§33.2(g) (continued)

(1) All funds under this part shall be apportioned among all states on a substantially equal basis, based upon the number of eligible students for whom funds are sought, with allowance being made for the actual cost of delivering educational services in each state. For the purpose of determining the actual cost of delivering educational services in each state, the Commissioner shall refer to the average per-pupil expenditure of each state.

(2) Absent special or exceptional circumstances, funds under this part shall be distributed among the educational agencies within each state so that each contracting educational agency will receive approximately the same amount for each eligible Indian student to be served under the contract.

Comment: One of the major, continuing criticisms of the Johnson-O'Malley program, as presently administered, is that funds are distributed to states, and to schools within the states, on a completely arbitrary basis. For example, the average per-pupil expenditures during 1968-71 ranged from highs of $932 and $616 in Alaska and Iowa respectively to lows of $70 and $58 in Nevada and Oklahoma. Federal Funding of Indian Education: A Bureaucratic Enigma, at 85 (Bureau of Social Science Research, 1973). There are numerous instances of huge disparities between districts in regard to per-pupil Johnson-O'Malley expenditures; these disparities exist even within states. Our conclusion is that these disparities are not based upon any discernible pattern.

The equalization procedure suggested above is simple and yet would result in substantial equity among states and among educational agencies within each state.

Basically, the proposed equalization provision is as follows. First, total funding would be established for each state. This does not mean that payments would go to a state agency, but only that the initial categorization would be on a state-by-state basis for convenience. Very significantly, distribution among the states would not simply be on an equal, per-pupil basis. This is because some states require more funding for each student; the best example, of course, is Alaska. Such differences among states are resolved

§33.2(g) (continued)

by this section, which uses as its departure point the state per-pupil expenditure.

Funds are then distributed among the educational agencies within each state. Again, flexibility is built in because some areas in a state would have greater need for special programs; this might be particularly true, for example, for schools in traditional reservation areas. Thus, the starting point is that each educational agency will receive approximately the same per-pupil expenditure, but exceptions can be made for "special or exceptional circumstances."

We believe that this kind of equalization approach is both required by law and fair. The legal considerations requiring that Johnson-O'Malley funding not be limited to areas with "large blocks of tax-exempt land" are set forth in the comment to §33.2(b) above. The formula is fair because it will make Johnson-O'Malley funding available to all BIA-eligible Indians, with proper provision being made for special needs in particular areas. No longer would any BIA-eligible Indians be excluded on a purely catch-as-catch-can basis, as is the case now. This proposed equalization plan would, among other things, eliminate the high irony involved in the present distribution scheme which largely excludes California Indians; it was, after all, California Senator Hiram Johnson who introduced and gave his name to the Johnson-O'Malley Act.

§33.3 Community Participation

(a) Parental involvement at the local level is an important means of increasing the effectiveness of programs provided by funds under this part. Accordingly, it is the policy of the Commissioner, in regard to funds distributed under this part, to require the maximum participation by the community affected. Such participation shall include, but shall not be limited to, the provisions of this section. In the case of contracts with parent contracting institutions, properly nominated and selected pursuant to subsection 33.3(c) of this part, all provisions of this part relating to community education committees shall be optional and not mandatory.

§33.3 (continued)

Comment: This entire §33.3 provides strong provisions relating to community participation by community education committees. As stated above, one of the primary goals of these proposed regulations is to provide maximum self-determination by contracting directly with Indian groups. Unquestionably, however, substantial amounts of Johnson-O'Malley funds will continue to be used in public schools for the foreseeable future. The provisions of §33.3 are designed to make certain that parents of children in public schools receiving Johnson-O'Malley assistance will have substantial, reasonable input into, and control over, Johnson-O'Malley programs.

The first sentence of this subsection is identical to the policy statement made in the Title I Regulations. See 45 C.F.R. §116.17(o)(1).

The last sentence makes community education committees optional when the contractor is a parent contracting institution. Any parent contracting institution must be selected pursuant to subsection 33.3(c), the same procedures by which community education committees are selected. Accordingly, requiring a separate committee in this context would be duplicative and almost certainly unnecessary, since subsection 33.3(c) assures community input whenever a parent contracting institution is established.

(b) Each educational agency, with the exception of parent contracting institutions, receiving funds under this part shall provide for the establishment of a community education committee for each community affected. All committee members shall be nominated and selected pursuant to subsection 33.3(c) of this part. Each educational agency shall expend an appropriate amount of funds for conducting elections of education committees, for attendance at education meetings, and for reasonable expenses incurred by education committees in the planning, development, evaluation, and monitoring of programs.

Comment: The first sentence is taken from subsection 33.3 (g) of the 1971 draft. The phrase "the community affected" was changed to "each community affected". In the past, Johnson-O'Malley contracts have been state-wide or area-wide. In many cases, the parent committees have not operated from the local level. The result has been that the committees have not been in a position to evaluate and monitor each specific school.

§33.3 (continued)

The language requiring expenditures for planning, etc. reflects the fact that these committees may need outside help, particularly in the area of monitoring.

(c) All community education committees and parent contracting institutions shall be nominated and selected by procedures determined by the Indian community affected, such as sanction by the tribal governor where necessary. Members shall be selected by the Indian people in the community affected, and, where the program or project will serve secondary school students, Indian secondary school students. Selection of members shall not limit the continuing participation of the Indian community in the operation and evaluation of the program. Each member shall be designated by name and address in the application.

Comment: The language from this subsection is taken from the proposed regulations for Title IV of the Indian Education Act. 45 C.F.R. §§186.15 and 186.16. Many of the detailed provisions of the Title IV Regulations, however, have been deleted on the ground that the language proposed above assures maximum community control over the selection process and yet is not unnecessarily inflexible or technical.

(d) Each community education committee shall be authorized to:

(1) make an initial assessment of the needs of Indian children in the community affected;

(2) participate in negotiations concerning contracts under this part;

(3) participate in the planning, development, evaluation, and monitoring of programs;

§33.3 (continued)

(4) hear complaints by Indian students and their parents;

(5) meet regularly with the professional staff serving Indian children and with the local educational agency;

(6) establish rules for conducting its offices; and

(7) have such additional powers as are consistent with these regulations.

Comment: The provisions of this subsection are taken from subsection 33.3(g) of the 1972 draft. The flexible provision in subsection (d)(7) is necessary to be certain that the operations of the community education committees will not be unduly restricted.

§33.4 Applications

(a) Each application for funding under this part shall be submitted on or before a reasonable application deadline, to be determined by the Commissioner. Each application shall state the specific program for which funds are to be used, shall include a detailed narrative description of each such program, and shall state the amount budgeted for each such program. The Commissioner shall provide application forms upon request.

Comment: This subsection defines more specifically the nature of the information which should be required in the application.

(b) In its application, the educational agency shall certify as to the truth of all facts concerning eligibility, as re-

§33.4 (continued)

quired by subsections 33.2(b), (c), (d), (e), (f) and (g) of this part.

Comment: This subsection is another provision which serves to focus accountability.

(c) Each application shall be developed in open consultation with parents of Indian children, teachers, and, when applicable, secondary school students, including public hearings at which such persons have had a full opportunity to understand the programs proposed in the applications and to offer recommendations on such programs. Each application, and any subsequent changes in the program described in the application, shall be approved by the community education committee for each community affected and shall include a sign-off by the chairman of each such community education committee. Each application shall describe how the community edcuation committee was consulted in the planning of the project and shall set forth specific plans for continuing the involvement of parents in the future planning, development, and operation of the project.

Comment: The first sentence of this subsection is taken from Title IV of the Indian Education Act. See 20 U.S.C. §241dd(b)(2)(B)(i). The "public hearing" requirement should put teeth into community involvement during the proposal-writing stage.

The approval and sign-off provisions of the second sentence of this subsection are from subsection 33.3(g) of the 1972 draft, except that the committee is given the important power to approve any changes in the program if the contractor seeks to make changes during the school year. These "veto" provisions have been shown by experience to be the only realistic means to assure reasonable community input; the use of parent committees which can only "advise" or "consult" will continue to be ignored by public school districts.

§33.4 (continued)

The third sentence is taken from the Title I Regulations. See 45 C.F.R. §116.7(o)(1). The provisions of this subsection should assure that there will be substantial community involvement before the programs go into effect.

(d) Each educational agency, when applying for funding under this part, shall attach to its application a plan for the distribution of contract funds, which shall be approved by the Commissioner and by the appropriate community education committee.

Comment: This is similar to subsection 33.3(a) of the 1972 draft. The subsection here includes the words "approved by", which are more definite than "acceptable to" the Commissioner. This phraseology also promotes accountability by establishing the specific person in the Bureau of Indian Affairs who will approve the application in question.

(e) Each of the provisions of this section shall be a condition to the receipt of funding under this part.

§33.5 General Requirements for Contracts

(a) With the exception of exemptions granted pursuant to subsection 33.5(b) of this part, all funds under this Act shall be used for special, supplemental programs for the exclusive benefit of Indian children. Such special programs shall be designed to meet the special needs of Indian students, which may result from the financial station of their parents, from cultural and language differences, or from other factors. Such funds shall supplement, and not supplant, state and local funds. Each contract shall require that the use of these funds will not result in a decrease of state, local or other federal funds for Indian children which, in the absence of funds under this part, would be made available for Indian children.

§33.5 (continued)

Comment: This subsection complies with Natonabah v. Board of Education, 355 F.Supp. 716, 726 (D. N.M. 1973), holding that, except under exceptional circumstances, Johnson-O'Malley funds must be expended for the "special needs" of Indian children.

The second sentence is taken substantially intact from §33.2(b) of the 1974 Proposed Rules.

The last sentence is almost identical to subsection 33.2(e) of the 1972 draft. The word "federal" is added to be absolutely certain that Johnson-O'Malley funds will not be used to supplant other supplementary programs, a problem which has arisen in New Mexico. That is, programs which have been disapproved under Title I have been rebudgeted under Johnson-O'Malley. Such a provision will also make certain, for example, that a district will not bring in a Title VII bilingual program and use it only for other non-English-speaking students because Indians have Johnson-O'Malley funds.

(b) The commissioner may, under extraordinary and exceptional circumstances, make exemptions to the requirements of subsection 33.5(a). Such exemptions may be made only upon written requests by the educational agency and by the community education committee for the community affected. No such exemption shall be granted unless the educational agency certifies that the applicable minimum standards cannot be met in the absence of such an exemption. Any such exemption must be approved in writing by the Commissioner. In determining whether such an exemption should be permitted, the Commissioner shall give greater weight to a request for such an exemption when the request is from an Indian-controlled educational agency.

Comment: The exemption for "extraordinary or exceptional circumstances" is permitted by subsection 33.4(c) of the present regulations. The exemption permits the use of Johnson-O'Malley funds for the operational budget if a strong case for such use is presented. The added weight given to requests by Indian-controlled districts is reasonable in light of the fact that most problems in this area have arisen in districts which are not Indian-controlled. The "added weight" provision is also important in permitting the funding of basic support for experimental Indian-controlled schools.

§33.5(b) comment (continued)

These regulations contain no provision requiring a public school district to maintain a "reasonable tax effort" although such a requirement would most logically be included in the exemption permitted by this subsection. There are several reasons for omitting that provision. First, the phrase "reasonable tax effort," or "average tax effort" really has no meaning; rich and poor districts cannot be compared using such a standard, and such a standard could be used to punish genuinely impoverished areas. Second, the remedy, if a district's tax effort is not "reasonable," is to require a district to raise its taxes; our experience is that such a requirement is wholly unrealistic -- a public school district, unless there is overwhelming Indian control, simply will not raise its taxes in order to provide supplemental funds for Indian students. Under such circumstances, most districts would refuse Johnson-O'Malley money rather than raise their tax rates, with the result that the Indian children would be deprived of funds entirely. Finally, we believe that other provisions of these proposed regulations require a district to draw upon basic support to the fullest extent possible, so that the "reasonable tax effort" requirement would be in any event duplicative. See, 33.2(e), 33.2(f), 33.5(a) and 33.5(b) of these proposed regulations.

(c) Any contract under this part shall include provisions that funds will be spent only on eligible Indian children, that programs will be monitored and evaluated by the educational agency and by the community education committee for the community affected at least once a year, and that the educational agency will maintain such administrative controls as may be prescribed by the Commissioner. The contract shall require each educational agency to provide an annual report of expenditures, a detailed annual narrative report of the programs involved, and any other information which the Commissioner may require.

Comment: This subsection is similar to subsection 33.3(b) of the 1972 draft. Monitoring and evaluation by the community education committee is added to be certain that there will be adequate monitoring and evaluation by the parents who will be most directly affected. This subsection also requires the educational agency to provide the necessary information so that the Commissioner can properly monitor the program, as provided in §33.6 below.

§33.5 (continued)

(d) Each contract shall include provisions that the educational agency will comply in full with the requirements concerning community participation, as set forth in subsection 33.3 of this part.

(e) The contract shall provide that all educational agencies receiving funds under this part will be open to visits and consultations by duly-accredited representatives of the federal government, by parents in the community affected, and by tribal representatives.

Comment: This proposed subsection is identical to subsection 33.3(e) of the 1972 draft.

(f) All contracts, records, reports, budgets, budget estimates, plans, and other documents pertaining to the administration of the program shall be provided to each community education committee by the educational agency. Such documents shall be made available, upon request, to members of the public by educational agencies and by local school officials for inspection. Educational agencies and local school officials shall provide, free of charge, single copies of such documents upon request.

Comment: This proposed subsection is similar to subsection 33.3(f) of the 1972 draft. We emphasize that this subsection is essential, as it stands, if the community education committee is expected to function properly.

(g) Any Indian student, parent of an Indian student, tribal representative, or community education committee in a community receiving funds under this part may complain in writing to the relevant educational agency that the program is not being administered

§33.5 (continued)

in accordance with the statutes, regulations, or contracts relating to the program. If the contracting agency does not take action satisfactory to the complaining party within 30 days, appeal may be taken to the Commissioner, who shall conduct a hearing, if requested by the complaining party, and render a written decision within 30 days from the date on which the appeal is filed. Such written decision shall state all reasons for the decision. If no action is taken by the Commissioner, no further right of appeal or request for reconsideration exists within the Department of the Interior and shall constitute final administrative action.

Comment: This important subsection, which provides a grievance procedure, is similar to subsection 33.3(h) of the 1972 draft. The proposed subsection adds the language concerning a written decision by the Commissioner within 30 days so that prompt action will be assured.

§33.6 Review, Monitoring, and Withholding of Funds by the Commissioner.

(a) The Commissioner shall review, at the end of each school year, the material submitted pursuant to subsection 33.5(c), as well as any other appropriate materials. In addition, the Commissioner shall, when appropriate, make on-site visits to monitor programs under this part. Such review and monitoring shall be conducted to determine whether each educational agency has complied, both fiscally and programatically, with these regulations, with the assurances made in the application, and with the provisions of the contract. The Commissioner shall make written approval or disapproval, in regard to each contract under this part, as to whether each educational agency receiving funds has substantially complied with

§33.6 (continued)

the above requirements. Such written approval or disapproval shall be made within 90 days after the completion of the school year in question.

Comment: These provisions will guarantee full review by the Bureau of Indian Affairs, a procedure which has not existed in the past. We think it beyond dispute that such review is necessary, on a policy basis, to assure compliance with the regulations, particularly in educational agencies which are not Indian-controlled. In addition to the policy reasons, the Department of the Interior is required to monitor all of its programs by the common-sense provisions of 31 U.S.C. §66(a):

> "The head of each executive agency shall establish and maintain systems of accounting and internal control designed to provide--
> (1) full disclosure of the financial results of the agency's activities;
> (2) adequate financial information needed for the agency's activities;"

We cannot overemphasize the importance of this section. Plainly, there is no systematic monitoring in effect now. The Government Accounting Office reported in 1970 that the BIA has delegated full responsibility for the administration of the Johnson-O'Malley program to the various state departments of education and that the financial reports of those departments are inadequate to permit the BIA to determine whether the funds were appropriately allocated. Comptroller General of the United States (GAO), Administration of Program for Aid to Public School Education of Indian Children Being Improved at p.12 (1970). In addition, of course, the audit of the Department of the Interior, Office of Survey and Review, dated July 11, 1973, found widespread Johnson-O'Malley abuses in Oklahoma. The violations mentioned in those reports have continued unchecked and those reports disclose only the tip of the iceburg. The present situation is wrong -- legally, educationally, financially, administratively, and morally. In our judgment, the procedures in this section can rectify these serious inequities to Indian children with a modest expenditure of time, personnel, and expenses.

(b) Whenever the Commissioner, after reasonable notice and opportunity for a hearing to any educational agency, finds that there has been a failure to comply substantially with any provision

§33.6 (continued)

of these regulations, with any assurance in an application, or with any provision in a contract for funds under this part, he shall notify the agency that further payments under this part will not be made until he is satisfied that there is no longer any such failure to comply. In the alternative, the Commissioner may, in his discretion, notify the educational agency that the educational agency shall not make further payments to specified subdivisions of the educational agency which are affected by the failure. Until the Commissioner is so satisfied, further payments under this part shall not be made to that educational agency, or payments by the educational agency shall be limited to payments to subdivisions of the educational agency which are not affected by the failure, as the case may be. If a public school district commits any violation as described in the first sentence of this subsection, such violation shall be ground for contracting with an eligible parent contracting institution or other Indian-controlled organization, rather than with the public school district, at the earliest practicable date.

Comment: This subsection is virtually identical to the Title I regulations. See 45 C.F.R. §116.52(a). This subsection permits the Commissioner to act "whenever" he finds violations, so that he can act in mid-year if violations come to his attention. The last sentence should assist in transferring programs from public districts to Indian-controlled groups.

(c) Prior to initiating a hearing under subsection 33.6(b) of this part, the Commissioner will attempt to resolve any apparent differences between him and the educational agency. Nothing contained in this part shall be deemed to prevent any educational

§33.6 (continued)

agency from seeking the advice of the Commissioner prior to disposing of such matters.

Comment: This subsection is virtually identical to the Title I Regulations. See 45 C.F.R. 116.52(b). This subsection will provide important flexibility, since it permits the Commissioner to negotiate any alleged violations with the educational agency before taking the matter to hearing or withholding funds.

§33.7 Public and Private School Use of Federal Property

(a) The use of federally-owned facilities for public or private school purposes may be authorized when not needed for federal activities. Transfers of title to such facilities may be arranged under the provisions authorized by law.

(b) When nonexpendable government property is turned over to public or private school authorities under a permit, the permittee shall insure such property against damage by fire, windstorm, and tornado in amounts and with companies satisfactory to the superintendent or officer in charge of the Indian agency charged with responsibility for the property. In case of damage or destruction of such property by fire, windstorm or tornado, the insurance money collected shall be expended only for repair or replacement of such property; otherwise insurance shall be remitted to the Bureau.

(c) The educational agency shall maintain the property in a reasonable state of repair.

Comment: This standard provision is contained in the 1972 draft, the present regulations, and the 1974 Proposed Rules.

§33.8 Periodic Review of Regulations

The Commissioner shall review the effectiveness of these

§33.8 (continued)

regulations at two-year intervals, beginning with the effective date of these regulations. When conducting such review, the Commissioner shall solicit comments by all contractors, by all contractors whose applications have been refused, by Indian tribes, by organizations involved in Indian education, and by other interested parties. Such review shall be directed toward the means by which the funds under this part can most effectively be used for supplemental, special programs to further the education of the Indian children who are the intended beneficiaries of these funds.

Comment: This subsection should serve to provide a continuing dialogue so that the vitality of the regulations will be preserved.

CONCLUSION

The Bureau of Indian Affairs now has a new administration. It is an administration in which a great majority of Indian people have been willing to place their confidence, until shown to the contrary. Obviously the new Johnson-O'Malley regulations will be one of the first major tests of this administration's resolve to put the interests of the Indian people first. We believe there could be no better display of this administration's resolve than to adopt these regulations, substantially intact, in time for the 1974-75 school year. The benefits to the nation's Indian children will be immediate, far-reaching, and long-lasting.

Date: February 28, 1974

Alaska Federation of Natives
All-Indian Pueblo Council of New Mexico
American Association of Junior and Community Colleges
American Indian Law Center
Americans for Indian Opportunity
California Indian Legal Services
Coalition of Eastern Native Americans
Coalition of Indian-Controlled School Boards
Dinebeiina Nahiilna Be Agaditahe
Harvard University Center for Law and Education
Indian Education Talent Search
Indian Education Training, Inc.
Indian Legal Information Development Service
Institute for the Development of Indian Law
Intertribal Council of California, Inc.
Intertribal Council of Nevada
Mississippi Band of Choctaws
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Businessmen, Indian Youth Programs
National Congress of American Indians
National Education Association

National Education Association, First Americans Task Force
National Indian Education Association
National Indian Lutheran Board
National Indian Youth Council
Native American Center of Oklahoma City
Native American Legal Defense and Educational Fund, Inc.
Native American Lobby
Native American Rights Fund
Native American Training Associates Institute
Nebraska Indian Intertribal Development Corporation
Nevada Indian Legal Services
Northern Pueblos Council of New Mexico
Oklahoma Indian Education Association
Small Tribes of Western Washington
Tanana Chiefs Conference
United Scholarship Service
Western Interstate Commission on Higher Education
The Navajo Tribe